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Supreme Court, U.S.
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No. 08-

IN THE

# Supreme Court of the United States

BASHAS', INC.,

*Petitioner,*

*v.*

JOSE PARRA, GONZALO ESTRADA AND AURELIA MARTINEZ,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Did the Ninth Circuit fail to comply with this Court's mandate in *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008), instructing the circuit courts to remand for clarification instead of presuming that the district court intended an obviously incorrect legal result when its order is susceptible of a legally correct reading?

## LIST OF PARTIES AND RULE 29.6 STATEMENT

The names of all of the parties to the proceedings below are contained in the caption of the case.

Bashas', Inc. is a privately held corporation existing under the laws of the State of Arizona. There is no parent and no publicly held company owning 10 percent or more of the corporation's stock.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| LIST OF PARTIES AND RULE 29.6 STATEMENT | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF APPENDICES | v |
| TABLE OF CITED AUTHORITIES | vi |
| PETITION FOR A WRIT OF CERTIORARI | 1 |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| STATEMENT OF THE CASE | 1 |
| A. Introduction and Summary | 1 |
| B. Factual Background | 4 |
| C. Procedural Background | 6 |
| 1. District Court | 6 |
| 2. Ninth Circuit | 8 |

*Contents*

*Page*

REASONS FOR GRANTING THE PETITION 9

I. THE NINTH CIRCUIT IGNORED *SPRINT/UNITED* AND ASSUMED THAT THE DISTRICT COURT INTENDED AN OBVIOUSLY INCORRECT LEGAL RESULT. ..... 9

II. THE NINTH CIRCUIT USURPED THE DISTRICT COURT'S AUTHORITY TO MAKE FINDINGS OF FACT IN THE FIRST INSTANCE. ..... 13

III. COMMONALITY IS CRUCIAL HERE BECAUSE PLAINTIFFS SEEK TO AVOID RULE 23(b)(3)'S MORE STRINGENT CRITERIA. ..... 16

CONCLUSION ..... 19

## TABLE OF APPENDICES

*Page*

Appendix A — Opinion Of The United States Court Of Appeals For The Ninth Circuit Filed July 29, 2008 ..... 1a

Appendix B — Order Of The United States District Court For The District Of Arizona Dated March 30, 2006 ..... 11a

Appendix C — Order Of The United States District Court For The District Of Arizona Dated August 29, 2005 ..... 21a

Appendix D — Order Of The United States Court Of Appeals For The Ninth Circuit Denying Petition For Rehearing Filed September 12, 2008 ..... 77a

## TABLE OF CITED AUTHORITIES

*Page*

### CASES

*Bond v. Floyd*,
385 U.S. 116 (1966) ..... 11

*Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*,
532 U.S. 598 (2001) ..... 11

*Dukes v. Wal-Mart, Inc.*,
509 F.3d 1168 (9th Cir. 2007) ..... 15, 17

*Gonzales v. Police Dep't*,
901 F.2d 758 (9th Cir. 1990) ..... 12

*Gonzales v. Thomas*,
547 U.S. 183 (2006) ..... 3, 14

*INS v. Orlando Ventura*,
537 U.S. 12 (2002) ..... 3, 14

*Montrose Med. Group Participating Sav. Plan v. Bulger*,
243 F.3d 773 (3d Cir. 2001) ..... 16

*Philip Morris USA v. Williams*,
127 S. Ct. 1057 (2007) ..... 17

*Pullman-Standard v. Swint*,
456 U.S. 273 (1982) ..... 14

*Cited Authorities*

*Page*

*Shipes v. Trinity Indus.*,
987 F.2d 311 (5th Cir. 1993) ..... 17

*Sprint/United Mgmt. v. Mendelsohn*,
128 S. Ct. 1140 (2008) ..... *passim*

*Ticor Title Ins. Co. v. Brown*,
511 U.S. 117 (1994) ..... 17

*Trevizo v. Adams*,
455 F.3d 1155 (10th Cir. 2006) ..... 18

*Wilson v. Nevada*,
666 F.2d 378 (9th Cir. 1982) ..... 11

**STATUTES AND RULES**

28 U.S.C. § 1254(1) ..... 1

42 U.S.C. § 1981 ..... 4

Fed. R. Civ. P. 23 ..... *passim*

Fed. R. Evid. 403 ..... 10

S. Ct. R. 16.1 ..... 1

## PETITION FOR A WRIT OF CERTIORARI

Bashas', Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals is reported at 536 F.3d 975. (App. A, at 1a-10a.) The order of the court of appeals denying Bashas', Inc.'s petition for rehearing and rehearing en banc is unreported. (App. D, at 77a-88a.) The district court's orders are reported at 2006 WL 5987819 and 2005 WL 6182338. (App. B, at 11a-20a; App. C, at 21a-76a.)

## JURISDICTION

The court of appeals issued its opinion and entered judgment on July 29, 2008. The court of appeals denied Bashas', Inc.'s petition for rehearing and rehearing en banc on September 12, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2000).

## STATEMENT OF THE CASE

### A. Introduction and Summary

This petition involves yet another instance of the Ninth Circuit's ignoring the limits on appellate review imposed by this Court. Indeed, the Ninth Circuit's decision has so encroached on the district court's authority to decide in the first instance matters committed to its discretion that summary reversal under Supreme Court Rule 16.1 is appropriate.

Nine months ago, in *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008), the Court held that the Tenth Circuit erred by assuming that the district court intended an incorrect legal result – a categorical exclusion of certain evidence – when its order could have been interpreted as merely a determination that the evidence at hand was irrelevant under the facts of the case. By not remanding the ambiguous order for clarification, this Court concluded, the Tenth Circuit did not accord the district court the deference which is the "hallmark of abuse-of-discretion review." *Id.* at 1145.

The Ninth Circuit here showed the same lack of deference. It assumed that the district court found no commonality under Federal Rule of Civil Procedure 23(a) among a class of former and current Hispanic employees who worked in one of Petitioner's three different store formats – a determination committed to the district court's discretion – because the pay scales for all formats were equalized after plaintiffs sued. In other words, the Ninth Circuit assumed that the district court intended an obviously wrong result: that plaintiffs could not recover damages for alleged *past* pay discrimination because their wages were now the same as those offered at the other stores.

The Ninth Circuit's error was more egregious than the Tenth Circuit's in *Sprint/United*. Here, the district court actually clarified that it was *not* barring all class claims simply because the pay scales had been merged. Instead, the district court seemed troubled by the fact that plaintiffs sought relief for the class as a whole based on what they alleged was a company-wide pay policy, even though there were different pay scales that applied

to different employees at different times and for different reasons. To the extent the district court failed to articulate clearly the basis for its decision, *Sprint/United* required a remand for clarification.

This case illustrates perfectly the reasons for *Sprint/United*'s remand rule. Instead of remanding for clarification, the Ninth Circuit decided on its own that there *was* commonality and, in doing so, made a crucial finding of fact on a question that the district court had not yet addressed. Moreover, the Ninth Circuit did not acknowledge the contradictory evidence in the record. In just the last six years, this Court has *twice* chastised the Ninth Circuit for deciding factual matters in the first instance. *Gonzales v. Thomas*, 547 U.S. 183 (2006); *INS v. Orlando Ventura*, 537 U.S. 12 (2002). It appears a third time is warranted.

Whether commonality exists could be dispositive in this case, warranting the district court's full reconsideration. Plaintiffs want to bring a Rule 23(b)(2) class action seeking substantial back pay and punitive damages for more than 10,000 class members, each with his or her own work and pay history, even though Rule 23(b)(2), unlike Rule 23(b)(3), does not require the court to consider the superiority or manageability of such an action. If the Ninth Circuit decision stands, Petitioner faces the prospect of classwide liability without the ability to present its evidence of the many non-discriminatory reasons for differences in any two employees' pay, which should be considered *before* the district court determines whether a given class member is entitled to back pay and punitive damages. Plaintiffs should not be permitted to seek certification of what would

otherwise be a Rule 23(b)(3) class without the district court's revisiting whether the individualized nature of Petitioner's defenses defeats commonality.

**B. Factual Background**

This petition arises from a lawsuit that former and current Bashas', Inc. employees Jose Parra, Gonzalo Estrada, and Aurelia Martinez brought in the United States District Court for the District of Arizona. They assert claims for national origin discrimination under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 (2000) based on disparities in pay between current and former Hispanic employees and allegedly similarly situated employees at other Bashas', Inc. stores.

Bashas', Inc. ("the company") is a family-owned supermarket chain in Arizona with over 150 stores in various formats, three of which are the focus of this case: "Bashas'," "A.J.'s Fine Foods," and "Food City." These three store formats are completely different. Bashas' stores use the conventional supermarket format, emphasizing quality goods and customer service and serving the immediate neighborhood's customer base. A.J.'s stores are gourmet and specialty stores with chef-prepared entrees, an extensive wine collection with knowledgeable staff, specialty baked goods, and the highest levels of customer service. Food City stores are "everyday low price" or "price impact" stores, emphasizing lower prices rather than abundant services.

The company purchased its first Food City store in 1994. At the time, Food City marketed products desired

by the local neighborhood, which was predominantly Hispanic. In the mid to late 1990s, the company purchased other local grocery stores and converted them to the Food City format, and it even converted existing Bashas' stores to Food City stores, because the Food City format worked well in the small, largely Hispanic neighborhood-grocer market.

As each new Food City opened, employees hired from the predecessor store were placed on the Food City wage scale, and thus they often received raises. The Food City wage scale was based on wages paid by such competitors as individually owned single-store grocers, carnicerias, Southwest Supermarkets, and Wal-Mart, which paid lower wages than the large unionized grocers and often did not provide benefits, which the company provided for all its store formats. When the company converted a Bashas' to a Food City, the Bashas' employees were "grandfathered" at their then-existing wage.

During this time, A.J.'s and Bashas' each had separate pay scales. The pay scales at the three store formats applied to over forty different job classifications, ranging from cashiers and various types of clerks (e.g., deposit, produce, and courtesy) to tortillaria clerks to meat cutters. Some of those job classifications existed in all three formats, while others were unique to one format or another. For each job classification, there was a scale of various wage levels, referred to as "steps," which an employee progressed up based on hours worked in that classification.

Beginning in 1997, the company began merging its various pay scales for certain job classifications on a step-by-step basis in response to competition from other grocers over workforce recruitment and retention. In the early 2000s, as the Food City stores grew in number with the company's acquisition of twenty-two Southwest Supermarkets, management concluded that Food City had finally begun competing with larger supermarket chains for employees, and it decided to move more aggressively toward the higher-paid, unionized grocery store wage scales, such as those at Bashas' stores. (*See* App. C, at 25a.) By the end of 2001, wages were the same for over 30 percent of the seventy or so steps that existed in all three store formats. By 2003, the percentage increased to nearly 70 percent.

## C. Procedural Background

### 1. District Court

The three named plaintiffs worked at Food City. Their March 2004 amended complaint alleges that the Food City workforce is disproportionately Hispanic, that the duties required for a given job classification do not vary from store to store, and that the hourly wages for Food City employees were consistently lower than those for employees at Bashas' and A.J.'s stores in similar jobs. Plaintiffs also asserted claims on behalf of a class of "Hispanic workers employed by defendant in an hourly position at any Food City retail store since April 4, 1998, who have been or may be subject to the challenged pay policies and practices."

The district court denied plaintiffs' motion for certification of a class on the pay issue, concluding that plaintiffs could not satisfy Rule 23(a)(2)'s commonality requirement because not all class members were similarly affected by the pay scales:

> [A]lthough Defendant's system for compensating hourly employees is similar across all stores, the Court is not satisfied that the manner in which the system affects the class raises issues that are common to all class members.

(App. C, at 58a.) Insofar as the company merged its pay scales over time, the district court reasoned, the fact that past pay schedules established for Food City stores contained lower pay ranges than those used at Bashas' and A.J.'s *alone* does not indicate commonality. (*Id.*)

Plaintiffs moved again for certification, seeking to redefine the class as those "who were subject to defendant's policy of using lower pay schedules for Food City workers" and excluding those who at all times during their employment were paid at a rate "that was the same as the rate for the equivalent position in Bashas' and A.J.'s Fine Food stores." (App. B, at 16a.) According to plaintiffs, they proposed the "tailored" class definition to address the district court's concerns that the class, as originally proposed, "was too broad in that it encompassed Hispanic employees who had been subject to lower pay scales as well as some who, in later years, were paid at the same rate as their counterparts . . . when rates for particular jobs were equalized." (*Id.* at 18a.)

The district court again found commonality lacking, observing that there was "no real difference" between the original and new class definitions and that plaintiffs' motion was "merely an effort to rehash law and facts that have already been considered by the Court." (*Id.* at 19a.) Plaintiffs obtained permission to appeal under Rule 23(f).

### 2. Ninth Circuit

The Ninth Circuit not only reversed the district court's specific ruling but also affirmatively determined that commonality existed. Its conclusion that the district court erred rested *entirely* on the assumption that, in finding no commonality, the district court "*only* looked at the current pay scales" and "failed to consider the evidence of *past* pay disparities and discrimination common to the Hispanic workers at Food City." (App. A, at 9a (emphasis added).) According to the Ninth Circuit, the district court should not have "bas[ed] its decision that the proposed class lacked commonality on the fact that the pay scales were equalized at the time of its order." (*Id.*) "Regardless of whether the pay scales are now equalized," the Ninth Circuit continued, "Plaintiffs allege past pay discrimination occurred" and, if true, "they are entitled to damages." (*Id.*)

The Ninth Circuit then determined on its own that commonality existed. It found that the employees' duties in the same job classification were "practically indistinguishable" across store formats and that the pay scales in question provided for different pay for similar jobs "based *only* on the store where the employee worked." (*Id.* at 3a, 9a (emphasis added).) The Ninth

Circuit remanded for consideration of the remaining Rule 23 requirements. (*Id.* at 10a.)

Bashas', Inc. timely petitioned for rehearing by the panel and en banc, arguing that under this Court's recent decision in *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008), the Ninth Circuit erred in two respects: (i) it should have remanded for clarification instead of assuming that the district court meant to bar *all* class claims merely because the pay scales had been merged, and (ii) it made, *in the first instance*, factual findings as to issues on which there was contradictory evidence. The Ninth Circuit denied the petition without explanation. (App. D.)

## REASONS FOR GRANTING THE PETITION

### I. THE NINTH CIRCUIT IGNORED *SPRINT/UNITED* AND ASSUMED THAT THE DISTRICT COURT INTENDED AN OBVIOUSLY INCORRECT LEGAL RESULT.

The Ninth Circuit did precisely what this Court told the courts of appeals not to do. It assumed that the district court intended an obviously wrong legal result – that putative class members were barred from recovering for alleged past pay discrimination once pay disparities were eliminated – when the district court's order was equally susceptible of an alternative (and legally correct) reading.

In *Sprint/United*, the Tenth Circuit reversed the district court's order excluding "other acts" evidence in an employment discrimination action, treating the

order as applying a per se bar to the admission of such evidence. *See* 128 S. Ct. at 1144. The Tenth Circuit then determined on its own that the evidence was relevant and not unduly prejudicial under Federal Rule of Evidence 403. *See id.*

There was not much to the district court's order in *Sprint/United.* It excluded evidence of discrimination against employees if they were not "similarly situated to plaintiff," which meant that the plaintiff's manager "was the decision-maker in [the other] adverse employment action" and that the two adverse employment actions were in "temporal proximity." *Id.* Beyond that, the district court "provided no explanation of the basis for its ruling." *Id.*

This Court unanimously reversed the Tenth Circuit. It held that the court of appeals erred by assuming that the district court had intended an incorrect legal result – that evidence about adverse action against employees with other supervisors is *never* relevant in proving age discrimination – when the basis for its order was "unclear." The Court recognized that it was possible that the district court simply meant to exclude the evidence because it "lacked sufficient probative value in this case to be relevant or outweigh prejudice and delay." *Id.* at 1146 (quotations omitted). That alternative interpretation was particularly appropriate given that "the applicable standard of review is deferential." *Id.* "When a district court's language is ambiguous," a remand "directing the district court to clarify its order . . . would have been the better approach." *Id.*

The Ninth Circuit's decision in this case is equally flawed. The court erred by assuming that, in finding no commonality, the district court had truncated its analysis by relying solely on the fact that the pay scales had been largely merged and by refusing to consider the other evidence in the record. Any such conclusion, however, would have been obviously wrong.[1] An assumption that the district court was oblivious to the availability of back pay flies in the face of what *Sprint/United* instructs.

Indeed, in denying plaintiffs' second class certification motion, the district court acknowledged that "the fact that Defendant eventually merged the contested pay scales *does not deprive victims of their right to seek redress for earlier violations.*" (App. B, at 18a (quotations omitted and emphasis added).) Just as in *Sprint/United*, 128 S. Ct. at 1145, neither party in this case ever said anything to the contrary in their papers or during oral argument. In fact, in the district court, Bashas', Inc. expressly did *not* make the argument "that all of the class members' claims are substantively barred by the equalization of the pay rates." (Clerk's Record ("CR") 230, at 11 n.10.) The district court even

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[1] It is axiomatic that "so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 608-09 (2001); *see Bond v. Floyd*, 385 U.S. 116, 128 n.4 (1966) (although request for injunctive relief was moot since legislative session had expired, rejected candidate's action was not moot since he would receive back pay if successful); *see also Wilson v. Nevada*, 666 F.2d 378, 380 (9th Cir. 1982) (plaintiff's claims for back pay survive "regardless of the mootness of any claims for declaratory or injunctive relief").

cited to a prior Ninth Circuit decision in which the court held that the fact "'[t]hat minority employees were promoted just before trial does not constitute a defense to plaintiff's charges, nor does it moot the issues.'" (App. B, at 18a (quoting *Gonzales v. Police Dep't*, 901 F.2d 758, 762 (9th Cir. 1990) (alterations and quotations omitted)).) The defect in plaintiffs' proposed class thus had nothing to do with the fact that some class members may not recover because they were *always* paid according to the merged pay scale.[2]

Instead, the district court was concerned that the various pay scales affected class members in different ways. This occurred because business decisions regarding whether and when to standardize wages among the three store formats were made job classification by job classification – *not* across the board at one time – and based on various factors, including the wages that the company's competitors offered at the time. Indeed, several Food City pay rates were *higher* than those for the same positions at a Bashas'. As the company's counsel explained in the district court, class members' "respective pay rates were constantly being changed, and the equalization of adjustments occurred at different times, and at different rates of adjustment, even different rates of adjustment from one step to another *within the same pay scale*." (CR 230, at 11 n.10 (emphasis added).)

[2] The district court made clear that "although the newly proposed definition explicitly limits itself to those that have suffered a loss, parties who have not suffered an economic loss would not have been entitled to relief under the original definition either." (App. B, at 19a.)

Given that liability would have to be determined on a step-by-step basis for each of the company's more than forty job classifications, the district court may have seen no way to adjudicate liability on a classwide basis. *See* Fed. R. Civ. P. 23(b)(2) (requiring adjudication as to the class "as a whole"). Indeed, this was precisely the argument that Bashas', Inc. made to the district court.[3]

Admittedly, the district court's orders are not a model of clarity. The court's emphasis on the merging of the pay scales – to the apparent exclusion of other evidence in the record – may have left its order susceptible to the Ninth Circuit's interpretation. But that was not the only plausible interpretation. The only certainty is that the district court did *not* deny certification simply because the merging of pay scales barred all class relief. Beyond that, clarification is needed, and a remand is required under *Sprint/United.*

## II. THE NINTH CIRCUIT USURPED THE DISTRICT COURT'S AUTHORITY TO MAKE FINDINGS OF FACT IN THE FIRST INSTANCE.

The Ninth Circuit's handling of this case illustrates why compliance with the *Sprint/United* remand rule is essential: after failing to remand for clarification, the Ninth Circuit compounded its error by acting as a trial court and resolving factual disputes in the first instance.

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[3] Jan. 24, 2005 Hr'g Tr. 36:7-18 (CR 236) (noting that Food City pay scale has over 70 steps that have changed at different times; commonality did not exist because "even this one pay scale has over 70 different questions to be answered about why scales were equalized, when they were equalized, [and] what considerations were taking into effect").

Remarkably, in just the last six years, this Court has summarily reversed the Ninth Circuit *twice* for doing just that. *See INS v. Orlando Ventura*, 537 U.S. 12, 17 (2002); *Gonzales v. Thomas*, 547 U.S. 183, 185 (2006).

In *Ventura*, this Court agreed with the petitioner that the Ninth Circuit failed to respect the Board of Immigration Appeals' role as fact finder, noting that, as here, the Ninth Circuit's finding was contradicted by other evidence in the record. 537 U.S. at 16-18. In *Gonzales*, the Court granted certiorari simply to reverse the Ninth Circuit for failing to comply with *Ventura*'s remand requirement. 547 U.S. at 185. The Court should do the same here: the Ninth Circuit's "failure to remand is legally erroneous, and that error is 'obvious.'" *Id.; see also Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982) ("When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings.").

The Ninth Circuit found that the duties for any given position were "practically indistinguishable" across Bashas', Inc.'s store formats and that the pay scales "provided for different pay for similar jobs based *only* on the store where the employee worked." (App. A, at 3a, 9a (emphasis added).) The Ninth Circuit provided no support for those findings, which served as the basis for its determination that commonality existed; there is no reference to plaintiffs' submissions in the district court or its appellate briefs, nor is there any citation to the record below or the district court's orders.

Nor did the Ninth Circuit address the contradictory evidence in the record. For example, there were sworn affidavits and testimony about differences in what was expected of class members depending on the store at which they worked. There was also similar evidence that store-level managers consider factors unique to each job applicant when initially placing new hires or transferees on a pay scale, without regard to the number of hours that they have logged in that position. As counsel explained at oral argument, "placement on the pay scale is a decision made by the store manager based on a number of criteria," including "personality, . . . background and skill set and prior work experience." (Jan. 24, 2005 Hr'g Tr. 21:6-19 (CR 236).)

Even plaintiffs' counsel conceded that "[w]ithin Food City managers have substantial discretion to decide where to place newly hired or promoted employees on the pay scale." (*Id.* at 5:13-15.) And their expert conceded that he had no way to account for employees' prior work experience or grandfathered wages. Thus, a key issue below was, as plaintiffs put it, whether "comparable employees were put on the pay scale at the same place." (*Id.* at 38:11-14.) The Ninth Circuit never mentioned any of this.

The district court believed that the company's evidence as to the "diversity of the positions listed on the contested pay schedules" and "the employment experience of class members" went to the merits of plaintiffs' claims. (App. C, at 61a, n.29.) A court may consider merits evidence at the class certification stage, *see Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1177 n.2 (9th Cir. 2007) ("If the district court had rejected Wal-Mart's

arguments regarding commonality solely because they overlapped with 'merits issues,' that would have been error."), and if the Ninth Circuit believed that additional facts regarding the source of wage disparities were needed to decide commonality, it should have remanded for the district court to make the necessary findings in the first instance. The Ninth Circuit violated the fundamental principle that "[w]hen a district court has failed to reach a question below . . . appellate courts should not step in when the resolution of an issue requires . . . fact finding." *Montrose Med. Group Participating Sav. Plan v. Bulger*, 243 F.3d 773, 786 n.12 (3d Cir. 2001) (citation and quotations omitted).

## III. COMMONALITY IS CRUCIAL HERE BECAUSE PLAINTIFFS SEEK TO AVOID RULE 23(b)(3)'S MORE STRINGENT CRITERIA.

The Ninth Circuit's failure to remand the commonality issue may affect the outcome of this case. Plaintiffs have sought certification under Rule 23(b)(2), which, unlike Rule 23(b)(3), does *not* require showings that common issues "predominate" over individual issues or that a class action is "superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Plaintiffs' efforts to avoid those additional procedural safeguards may leave commonality as the only check on whether 10,000 or so individual claims for back pay and punitive damages can be adjudicated in a single proceeding under Rule 23(b)(2), which contemplates relief "respecting the class *as a whole*." Fed. R. Civ. P. 23(b)(2) (emphasis added). This is not a remote risk: the Ninth

Circuit has held that it is perfectly acceptable to make "lump sum" awards of back pay and punitive damages in a Rule 23(b)(2) action, with the money to be distributed in some manner about which the defendant has no say. *See Dukes*, 509 F.3d at 1187, 1191 n.16 (class of 1.5 million seeking billions in back pay and punitive damages).

Thus, if the Ninth Circuit's decision stands, Bashas', Inc. could theoretically be held liable to the *entire* class without the opportunity to present its evidence of how it addressed wage disparities among its stores *pay step by pay step*, each time taking into account a variety of business factors. The company would also be denied the right to adjudicate (i) which class members (if any) were actually paid a discriminatory wage, given the evidence that two employees on the same pay step do not necessarily perform the same duties or have the same work experience,[4] and (ii) whether the company exhibited a reckless indifference to each such class member's federal rights, warranting punitive damages.[5]

In a Rule 23(b)(3) action, on the other hand, the company's evidence on all these matters would bear

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[4] *See Shipes v. Trinity Indus.*, 987 F.2d 311, 318 (5th Cir. 1993) (Title VII violations do not "*per se* entitle a class member to back pay without some individual clarification").

[5] Punitive damages in particular cannot be awarded without an individualized finding of harm to specific plaintiffs, *see Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007), and this Court has stated that there is at least a "substantial possibility" that monetary damages can *never* be recovered in a Rule 23(b)(2) class action, *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (per curiam).

significantly on whether each class member's claims could be adjudicated on their merits without conducting hundreds of mini-trials. For example, if the district court were to determine in its discretion that individual trials would be necessary to determine the reasons for each wage disparity, individual questions would "predominate," precluding class certification under Rule 23(b)(3). This inquiry should not be cast aside merely because plaintiffs style this instead as a Rule 23(b)(2) action.

To prevent unfair prejudice to Bashas', Inc., the district court should have an opportunity to clarify whether its commonality ruling addressed Bashas', Inc.'s various defenses or to explore, in the first instance, how they might impact the fairness of a Rule 23(b)(2) class action. *See Trevizo v. Adams*, 455 F.3d 1155, 1163 (10th Cir. 2006) (district court "retains discretion to determine commonality because it is in the best position to determine the facts of the case, to appreciate the consequences of alternative methods of resolving the issues of the case and . . . to select the most efficient method for their resolution" (quotations omitted)). The Ninth Circuit has foreclosed this necessary inquiry, once again exceeding the bounds of proper appellate review. This Court should step in to enforce those bounds.

## CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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# APPENDIX

## APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JULY 29, 2008

## UNITED STATES COURT OF APPEALS NINTH CIRCUIT

No. 06-16038.

José PARRA; Gonzalo Estrada, and Aurelia Martinez,

Plaintiffs-Appellants,

v.

BASHAS', INC.,

Defendant-Appellee.

Argued and Submitted April 17, 2008.

Filed July 29, 2008.

Appeal from the United States District Court for the District of Arizona; Robert C. Broomfield, District Judge, Presiding. D.C. No. CV-02-00591-RCB.

Before: PROCTER HUG, JR., MARY M. SCHROEDER, and CONSUELO M. CALLAHAN, Circuit Judges.

*Appendix A*

HUG, Circuit Judge:

Plaintiffs, current and former Hispanic employees of Bashas', Inc., filed this class action alleging that they had been discriminated against based upon their national origin in violation of Title VII of the 1964 Civil Rights Act as amended ("Title VII"), 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981. Plaintiffs allege that defendant discriminated against them in pay and working conditions based on their national origin. The district court certified the proposed class as to the working conditions claim, but denied certification of the proposed class regarding the pay discrimination claim based upon a finding of lack of commonality within the class. Plaintiffs filed a motion for the district court to reconsider its motion and, in the alternative, they offered to redefine the pay discrimination class. Those motions were denied. The Plaintiffs appeal the court's decision to deny certification of the class alleging pay discrimination. We have jurisdiction over this appeal under 28 U.S.C. § 1292 because we granted Plaintiffs' request to file this appeal pursuant to Fed.R.Civ.P. 23(f). We reverse the district court concluding that it abused its discretion in failing to find commonality in the Plaintiffs' original class definition for the discriminatory pay claim.

I.

Bashas', Inc. owns and operates 150 grocery stores under three trade names: Bashas', A.J.'s Fine Foods ("A.J.'s") and Food City. Bashas', Inc. acquired A.J.'s

and Food City stores through a series of acquisitions and brought them under the umbrella of Bashas', Inc. while retaining the three trade names. Although Bashas', Inc. owns all of these stores, the demographics of the patrons and employees at the three trade name stores vary significantly. In particular, the employees of the 58 Food City stores are predominantly Hispanic, while Bashas' and A.J.'s have a much smaller number of Hispanic employees. During the time period relevant to this appeal, Hispanic workers at Bashas' and A.J.'s comprised around 15% of the workforce. At Food City, however, Hispanic employees routinely constituted approximately 75% of the workforce.

Although the stores operate under different trade names and serve different clientele, the job requirements for the employees at the stores are practically indistinguishable. Regardless of these similarities, the wages for similar jobs at the three brand named stores differed until around 2003 when the pay scales were equalized through a phased pay-merger program. The plaintiffs produced evidence that according to these pay scales, the hourly pay disparities for comparable jobs at the three brand named stores ranged from $0.15 per hour to $2.94 per hour. These hourly disparities translate to annual salary differences of around $300 per year to almost $6,000 per year. These pay disparities resulted in the predominantly Hispanic Food City employees receiving less pay than their counterparts in the Bashas' or A.J.'s stores.

*Appendix A*

Plaintiffs brought this case to address their concerns about the disparate pay and working conditions among the three brand named stores. After initially filing the complaint, the Plaintiffs sought to certify a class of employees consisting of:

All Hispanic workers employed by defendant in an hourly position at any Food City retail store since April 4, 1998, who have been or may be subject to the challenged pay policies and practices and disparate working conditions.

In its initial class certification order, the district court certified the class as to the disparate working conditions claim. However, the district court found that the Plaintiffs could not establish the commonality requirement for the disparate pay claim and denied their request for class certification of this claim.

The Plaintiffs then filed a motion asking for reconsideration and, alternatively, to redefine the class. However, the district court denied both the motion for reconsideration and the motion to redefine the class because the court saw "no real difference" between the newly proposed class and the original class. The proposed newly defined class was:

> All Hispanic workers employed by defendant in an hourly position at any Food City retail store since April 4, 1998, who were subject to defendant's policy of using lower pay schedules for Food City workers than for

> workers in comparable position in Bashas' and A.J.'s Find Food stores. The class excludes any Hispanic Food City employee who was, at all times during his or her employment, paid a rate that was the same as the rate for the equivalent position in Bashas' and A.J.'s Find Food stores.

We granted Plaintiffs' request to file this appeal pursuant to Fed.R.Civ.P. 23(f) to review the district court's decision.

## II.

We review a district court's order on class certification for an abuse of discretion. *Molski v. Gleich*, 318 F.3d 937, 946 (9th Cir.2003). We limit our review to whether the district court correctly selected and applied Rule 23's criteria. An abuse of discretion occurs when the district court, "in making a discretionary ruling, relies upon an improper factor, omits consideration of a factor entitled to substantial weight, or mulls the correct mix of factors but makes a clear error of judgment in assaying them." *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 295 (1st Cir.2000).

*Appendix A*

## III.

The requirements for establishing a class action are set forth in Fed.R.Civ.P. 23, which provides:

> (a) prerequisites. One or more members of the class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or facts common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.[1]

In this case, we review only the district court's order finding that the Plaintiffs failed to establish commonality among the proposed class members for their pay discrimination claim.[2] To establish commonality,

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1. Rule 23(b) provides three additional requirements for bringing a class action, one of which must be met in order to bring the action. We do not discuss the other requirements of Rule 23(b) because the district court ruled that the class certification was based on failure to meet the commonality requirements of Rule 23(a)(2).

2. We review only the commonality finding because the district court stopped analyzing the Plaintiffs' class certification request for the discriminatory pay after finding commonality lacking.

"[t]he existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir.1998); *Staton v. Boeing Co.*, 327 F.3d 938, 953 (9th Cir.2003).

In *Staton v. Boeing Co.*, we upheld a district court's finding of commonality for a very broad class. 327 F.3d 938 at 956. The *Staton* class consisted of over 15,000 African-American salaried and hourly employees who alleged company-wide discriminatory practices. *Id.* at 953. Although the class consisted of salaried and hourly employees in different positions as well as employees from companies Boeing recently acquired, we upheld the district court's finding that commonality existed because the class suffered under "company-wide discriminatory practices." *Id.* We reiterated our holding in *Hanlon* that "[t]he existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Id.* (quoting *Hanlon*, 150 F.3d at 1019). The class in *Staton* illustrates that a proposed class can consist of members with widely differing experiences as they relate to the case but seek a common remedy for a common policy of discrimination.

Our decision in *Hanlon* also highlights the nature of the requirements to find commonality. 150 F.3d at 1019-20. We noted that Rule 23(a)(2) has been construed permissively and not all questions of fact and law need to be common to satisfy this rule. *Id.* at 1019. We again

described how commonality can be met even though members of a class have different methods of compensation. *Id.* at 1020. In *Hanlon*, as well as in *Staton*, we illustrated the flexible standard for commonality. Where the circumstances of each particular class member vary but retain a common core of factual or legal issues with the rest of the class, commonality exists.[3]

Here, the district court found past pay disparities for similar jobs at Bashas', Inc.'s three brand named stores. In its original order, the district court thoroughly analyzed the evidence proffered by both parties and noted three significant conclusions conceded by Bashas', Inc.:

> (1) Food City Stores have a higher percentage of Hispanic employees compared to Bashas' or A.J.'s stores, (2) the pay scales at Bashas' and A.J.'s stores were higher than those at Food City during the period 1998-2000, and (3) Hispanic employee hourly rates were lower in similar jobs.

However, the district court then found these concessions and Plaintiffs' other evidence were insufficient to

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3. Although this circuit has, up to now, never reversed a district court finding that commonality was lacking in an employment suit, other circuits have. *See, e.g., Forbush v. J.C. Penney Co.*, 994 F.2d 1101, 1106 (5th Cir.1993); *Cox v. Am. Cast Iron Pipe Co.*, 784 F.2d 1546, 1557 (11th Cir.1986); *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 561 (8th Cir.1982).

establish commonality among all class members because Bashas', Inc. has now merged its pay scales. Finding the pay disparities no longer existed at the time the order was written, the district court only looked at the current pay scales. In doing so, the district court failed to consider the evidence of past pay disparities and discrimination common to the Hispanic workers at Food City.

The district court here abused its discretion by basing its decision that the proposed class lacked commonality on the fact that the pay scales were equalized at the time of its order. Regardless of whether the pay scales are now equalized, Plaintiffs allege past pay discrimination occurred. The Plaintiffs claim damages from the effects of past discriminatory pay scales, and if they prevail on their claims, they are entitled to damages.

Similar to the certified classes in our cases previously described, the Plaintiffs here establish commonality even though their individual factual situations differ because they all seek a common legal remedy for a common wrong. Plaintiffs here not only presented evidence of discriminatory pay scales, but also provided statistical and anecdotal evidence of discrimination by Bashas', Inc. These pay scales were common for all Bashas', Inc. employees and provided for different pay for similar jobs based only on the store where the employee worked. The proposed class here shares the alleged discriminatory pay scales of Bashas', Inc. The class definition seeks to reach those Hispanic

employees who suffered past discrimination under these pay scales.

Finally, at oral argument, Bashas', Inc. argued that the difficulty in redressing the harm and calculating the various pay disparities for the different employment positions precludes class certification. We disagree. We have previously held that classes with far more complex remedies can seek redress in the form of a class action. *See, e.g., Staton*, 327 F.3d at 953-57. The claimed difficulties in the calculations of damages, as they affected the various class members, do not preclude class certification.

## IV.

In this case, the Plaintiffs presented the district court with extensive evidence showing Bashas', Inc.'s discriminatory pay practices commonly affected all members of the proposed class. We conclude the district court abused its discretion in failing to find commonality existed in the original class definition. Accordingly, we REVERSE the district court's finding that Plaintiffs' originally proposed class lacked commonality under Rule 23(a)(2) and REMAND for consideration of the remaining class certification factors in accordance with this opinion.

## APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED MARCH 30, 2006

**UNITED STATES DISTRICT COURT,**
**D. ARIZONA**

No. CIV 02-0591-PHX-RCB.

March 30, 2006.

José PARRA, et al.,

Plaintiffs,

v.

BASHAS', Inc.,

Defendant.

**ORDER**

ROBERT C. BROOMFIELD, Senior District Judge.

### I. Introduction

The original complaint in this action was filed by Plaintiffs José Parra and Gonzalo Estrada on April 4, 2002. Complt. (doc. 1). The Court granted Plaintiffs' motion to amend their complaint, and Plaintiffs filed their First Amended Complaint (doc. 116) on March 11,

2004, adding Aurelia Martinez as a named plaintiff. In their pleadings, Plaintiffs alleged that Defendant Bashas', Inc. ("Bashas' ") committed civil rights violations under 42 U.S.C. § 1981 for intentional discrimination and under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*, for both disparate impact and disparate treatment. In September 2004, Plaintiffs filed their motion for appointment of class counsel (doc. 152) and, under seal, filed their motion for class certification in this matter (doc. 159). These motions were fully briefed on November 23, 2004, and the issue of class certification was argued orally on January 24, 2005.

On August 31, 2005, the Court issued an order ruling on these motions. Order (doc. 224). In its order, the Court granted in part and denied in part Plaintiffs' motion for class certification. *Id.* at 52. Specifically, the Court certified a class defined as follows:

> All Hispanic workers employed by defendant in an hourly position at any Food City retail store since April 4, 1998, who have been or may be subject to the challenged disparate working conditions.

*Id.* However, the Court denied Plaintiffs' motion, without prejudice, as to the issues of the challenged pay policies and practices. *Id.* The Court ruled in such a manner because it concluded that Plaintiffs failed to satisfy the

"commonality" requirement of Rule 23(a)(2)[1] in relation to these issues. *Id.* at 39.

> Plaintiffs present evidence that Defendant's policies governing compensation are similar across all stores due to the fact that all of Defendant's stores use company-established pay schedules to determine rates of pay. Mot. (doc. 159) at 4. Defendant concedes that such pay schedules are used, and that past pay schedules established for Food City stores contained lower pay ranges than those utilized at Bashas' and A.J.'s stores. Resp. (doc. 190) at 11; Exbt. 7 (doc. 190) at ¶ 10. However, both parties concede that over the past several years the contested pay scales have merged and, for the most part, are now identical. Mot. (doc. 159) at 7; Resp. (doc. 190) at 14-15. Consequently, some class members may now receive pay that is equal to that of their counterparts in Defendant's other stores, while other class members may not. Thus,

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1. Rule 23(a) of the Federal Rules of Civil Procedure lists the prerequisites to a class action as:

> (1) the class is so numerous that joinder of all members is impractical, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

> although Defendant's system for compensating hourly employees is similar across all stores, the Court is not satisfied that the manner in which the system affects the class raises issues that are common to all class members.

*Id.*

In response to the Court's order, Plaintiffs filed a motion entitled "Plaintiffs' Supplemental Motion to Redefine and Limit Requested Class and to Reconsider August 31, 2005 Order." Mot. to Reconsider (doc. 225).[2] Believing that the characterization of this motion as both a "supplemental motion" and a "motion to reconsider" would cause confusion as to whether Defendant could respond, the Court issued an order permitting such a response. Order (doc. 229). Accordingly, Defendant filed its response on October 5, 2005. Resp. (doc. 230). Thereafter, Plaintiffs filed a motion requesting leave to file a reply in this matter, and attached the proposed reply to the motion. Motion for Leave to File (doc. 233).[3]

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2. I n its motion for reconsideration, Plaintiffs requested oral argument on this matter. Mot. to Reconsider (doc. 225). Finding oral argument unnecessary, the Court shall deny this request.

3. Defendant did not file an objection to Plaintiffs' motion for leave to file a reply. Therefore, the Court shall grant Plaintiffs' motion for leave to file their reply and has considered the reply in reaching its decision in this order.

*Appendix B*

This Court, having carefully considered the arguments presented by the parties, now rules on these matters.

**II. Motion to Reconsider**

The decision to grant or deny a motion for reconsideration is left to the sound discretion of the trial court. *See School Dist. No. 1J, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir.1993). Such motions are disfavored and are only appropriate if a court "(1) is presented with newly discovered evidence; (2) committed clear error or the initial decision was manifestly unjust; or (3) if there is an intervening change in controlling law." *Id* . A motion for reconsideration is not the place to make new arguments not raised in the original briefs. *All Hawaii Tours v. Polynesian Cultural Ctr.*, 116 F.R.D. 645, 650 (D.Haw.1987), *rev'd on other grounds*, 855 F.2d 860 (9th Cir.1988). Nor is it the time to ask the court to rethink what it has already thought. *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D.Va.1983).

Here, Plaintiffs do not raise any newly discovered evidence in their motion. In their request for reconsideration, Plaintiffs ask the Court to "certify a more limited class, covering *only* those employees who were actually paid a rate on the disputed pay scales, which was lower than that for comparable Bashas'/ A.J.'s Fine Foods workers[.]" Mot. to Reconsider (doc. 225)

at 2. Specifically, Plaintiffs ask that the Court certify a class defined as:

> All Hispanic workers employed by defendant in an hourly position at any Food City retail store since April 4, 1998, who were subject to defendant's policy of using lower pay schedules for Food City workers than for workers in comparable positions in Bashas' and A.J.'s Fine Food stores. The class excludes any Hispanic Food City employee who was, at all times during his or her employment, paid a rate that was the same as the rate for the equivalent position in Bashas' and A.J.'s Fine Food stores.

*Id.* Plaintiffs do not raise any new evidence in relation to this proposed change but merely argue that it is a clarification that will resolve the Court's prior concerns about the proposed class meeting the Rule 23(a)(2) requirement of "commonality." Reply (doc. 233) at 1. However, in support of this change, Plaintiffs put forth the same assertions that they posed in their initial motion for class certification. Mot. for Reconsideration (doc. 225) at 4-16. A motion for reconsideration that merely repeats arguments previously raised is appropriately denied. *Taylor v. Knapp*, 871 F.2d 803, 805 (9th Cir.1988).

Second, this Court did not commit clear error when it refused to grant Plaintiffs' motion for class certification on the issues of the challenged pay policies

and practices. To prove that the Court committed clear error, the movant must demonstrate that the Court's action falls clearly outside the bounds of its authority. *McDowell v. Calderdon*, 197 F.3d 1253, 1256 (9th Cir.1999). If the propriety of the Court's judgment is a debatable question, there is no clear error and the motion to reconsider is properly denied. *Id.* Here, Plaintiffs have made no arguments demonstrating that the Court's order falls outside the bounds of its authority.

Finally, Plaintiffs have not indicated that there has been an intervening change in controlling law. Therefore, the third basis for a motion for reconsideration is not met. Consequently, Plaintiffs' motion for reconsideration shall be denied.

## III. Motion to Redefine

Plaintiffs also base their motion on Rule 23(c)(1)(C) of the Federal Rules of Civil Procedure. Rule 23(c)(1)(C) provides that "[a]n order under Rule 23(c)(1) may be altered or amended before final judgment." This rule "provides district courts with broad discretion to determine whether a class should be certified, and to revisit that certification throughout the legal proceedings before the court." *Armstrong v. Davis*, 275 F.3d 849, 871 n. 28 (9th Cir.2001).

Pursuant to this discretion, Plaintiffs ask the Court to certify the more limited class, covering only those

employees who were actually paid a rate on the disputed pay scales. Mot. to Reconsider (doc. 225) at 2.

> As plaintiffs understand the [Court's prior] ruling, the Court concluded that the class, as proposed, was too broad in that it encompassed Hispanic employees who had been subject to lower pay scales as well as some who, in later years, were paid at the same rate as their counterparts at Bashas' and A.J.'s Fine Foods when rates for particular jobs were equalized . . . This narrower class definition is expressly tailored to address the concerns raised by this Court and satisfies the requirements of Rule 23(a) and 23(b).

*Id.* at 1. Plaintiffs assert that the fact that Defendant eventually merged the contested pay scales "does not deprive victims of their right to seek redress for earlier violations nor moot the issues." *Id., citing Gonzales v. Police Dept., City of San Jose, Cal.*, 901 F.2d 758, 762 (9th Cir.1990) ("That minority employees were 'promoted just before trial . . . does not constitute a defense to plaintiffs' charges, nor does it moot the issues . . .'"). Plaintiffs argue that evidence demonstrates that substantial differences remained in the 2001 pay scale, indicating that 2,200 Hispanic Food City employees held jobs paid based upon the lower pay scale. *Id.* at 5. In addition, Plaintiffs note that, while a number of pay steps were equalized in 2002 and 2003, more than 700

Hispanic workers were still paid based upon lower rates than their Bashas' counterparts in 2003.[4] *Id.*

In contrast, Defendant asserts that these same arguments were previously raised by Plaintiffs in their original motion for class certification. Resp. (doc. 230) 11-13.

> The evidence in this case has not changed since the Court's August 31, 2005 Order. The factual information offered by Plaintiffs is not new, it is simply repackaged.

*Id.* at 13. Moreover, Defendant argues that Plaintiffs' "redefinition" of the class is no different from the original definition proposed. *Id.* at 8. Defendant notes that, although the newly proposed definition explicitly limits itself to those that have suffered a loss, parties who have not suffered an economic loss would not have been entitled to relief under the original definition either. *Id.* at 8-9. Thus, Defendant maintains that Plaintiffs' motion is merely an effort to rehash law and facts that have already been considered by the Court, and asserts that the motion should be denied. *Id.* at 14. The Court agrees.

The Court sees no real difference between Plaintiffs' newly proposed class definition and that proposed in

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4. Plaintiffs note that because discovery was cut off in April 2004, they do not have the pay scales for 2004 and 2005 and are thus unable to determine whether the pay scales are now identical. Mot. to Reconsider (doc. 225) at 5 n. 5.

Plaintiffs' original Consequently, the motion currently reconsider matters that the Court pon. For the reasons explained above, such a motion must be denied.

Therefore,

IT IS ORDERED that Plaintiffs' motion for leave to file reply brief (doc. 233) is GRANTED.

IT IS FURTHER ORDERED that Plaintiffs' Supplemental Motion to Redefine and Limit Requested Class and to Reconsider August 31, 2005 Order (doc. 225) is DENIED.

DATED this 29th day of March, 2006.

## APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED AUGUST 29, 2005

**UNITED STATES DISTRICT COURT,**
**D. ARIZONA**

No. CIV 02-0591-PHX-RCB.

Aug. 29, 2005.

José PARRA, et al.,

Plaintiffs,

v.

BASHAS', INC.,

Defendant.

**ORDER**

ROBERT C. BROOMFIELD, Senior District Judge.

### I. Introduction

The original complaint in this action was filed by Plaintiffs José Parra and Gonzalo Estrada on April 4, 2002. Complt. (doc. 1). The Court granted Plaintiffs' motion to amend their complaint, and Plaintiffs filed their First Amended Complaint (doc. 116) on March 11, 2004, adding Aurelia Martinez as a named plaintiff.

*Appendix C*

In their pleadings, Plaintiffs alleged that Defendant Bashas', Inc. committed civil rights violations under 42 U.S.C. § 1981 for intentional discrimination and under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*, for both disparate impact and disparate treatment. In September 2004, Plaintiffs filed their motion for appointment of class counsel (doc. 152) and, under seal, filed their motion for class certification in this matter (doc. 159). These motions were fully briefed on November 23, 2004, and the issue of class certification was argued orally on January 24, 2005.

In response to these motions, each party filed motions to strike evidence. Defendant's Mot. to Strike (doc. 191); Plaintiffs' Mot. to Strike Evidence and Mot. to Strike Testimony (doc. 205 & 197). Also, prior to filing their motion for class certification, Plaintiffs filed a motion requesting permission to use expert analysis as a rebuttal opinion. Mot. Reb. Opin. (doc. 147). Defendant objected to Plaintiffs' request and filed a cross motion asking that the Court, in the event that Plaintiffs' motion is granted, allow them the opportunity to depose Plaintiffs' expert on the rebuttal analysis and offer a report in opposition. Resp. & Cross Mot. (doc. 179). All of these motions were fully briefed on December 30, 2004. This Court, having carefully considered the arguments presented by the parties, now rules on all of these matters.

*Appendix C*

## II. Background Facts

Defendant Bashas', Inc. operates grocery stores in Arizona under three different trade names: Bashas', A.J.'s Fine Foods ("A.J.'s") and Food City. Each of the three stores provides a different format of either traditional, gourmet or price-impact grocery. Hourly workers at all of Defendant's stores have their pay set in accordance with pay scales established by Michael Proulx, current president and Chief Operating Officer of Bashas', Inc.

. . .

### A. The History of Food City

The original Food City store was an independent neighborhood grocer established in the 1940s. Resp. (doc. 190) at 8. In January 1994, Defendant bought this original Food City store. *Id.* Thereafter, a Bashas' store was converted into a Food City store, based on the original Food City store design. *Id.* at 9. Wages of Bashas' employees at that store were not reduced after the conversion, but new hires at that store were placed on the lower Food City wage scale established at the original store. *Id.* In June 1996, a second Bashas' was converted to the Food City format. *Id.* The wages of existing employees and new hires were handled the same way as the previously converted Bashas' store. *Id.*

On December 15, 1996, Defendant bought sixteen Mega Foods stores, a warehouse grocery store chain.

Resp. (doc. 190) at 9. Twelve of the sixteen Mega Foods stores eventually became Food City stores. *Id.* These stores were in vastly varying conditions; some relatively new and in good condition, while others were older and had significant facility issues. *Id.* The pay scales at the Mega Foods stores "compared" with existing Food City rates in 1998. *Id.* A decision was made to raise the pay rates in these newly-acquired stores to the wage levels at the Food City stores. *Id.* By the end of 2000, Defendant had twenty-six Food City stores. Resp. (doc. 190) at 9.

Around 2001, Defendant purchased a few ABCO stores, some of which were converted to Bashas' stores and some of which were converted to Food City stores. *Id.* Again, Defendant contends that these stores were in a variety of different conditions. *Id.* at 9-10.

In November 2001, Defendant acquired twenty-two Southwest Supermarkets and converted them into Food City stores. *Id.* at 10. Defendant asserts that many of the stores had physical conditions which had been neglected. *Id.* In addition, Southwest pay scales were lower than Food City pay scales. *Id.* When these stores were acquired, Defendant states that it raised the wages of the Southwest employees up to the Food City scale within six months, or 780 hours of work. Resp. (doc. 190) at 10.

*Appendix C*

**B. History of the Pay Scales**

When the first Food City store was acquired in 1994, the hourly wages of the Food City employees were lower than the wages at Bashas' format stores. *Id.* at 11. Such hourly wages were not raised dramatically upon the purchase of Food City. *Id.* at 12. In 1997 and 1998, the pay scales between the Bashas' stores and Food City stores started to converge. *Id.* at 13. In 1999, Defendant went from six pay zones to four pay zones. *Id.* Defendant contends that in 2000 there were only four zones, and in 2000 and 2001 there was more movement toward uniformity. *Id.* Only after the acquisition of the Southwest Supermarkets did Defendant's management believe that Food City had become a chain in its own right and mandate a move to the higher paid, unionized grocery store wage scales. Resp. (doc. 190) at 14. Defendant contends that in 2001, the wage rates were "essentially equalized." *Id.*

**C. Plaintiffs' Claims**

In the case at bar, Plaintiffs claim that the hourly workforce at Food City stores is disproportionately Hispanic. Mot. (doc. 159) at 1. They assert that although the job positions within the different store formats are virtually identical, Defendant used a separate pay scale for Food City stores. *Id.* Plaintiffs further claim that from at least 1998, the written pay scale for Food City workers was consistently lower in most job positions than the same jobs in Bashas' and A.J.'s stores, and that even within Food City stores, Hispanic employees have been

paid less than their white counterparts in similar positions. *Id.* Moreover, Plaintiffs claim that working conditions within Food City stores were inferior to those of Bashas' and A.J.'s stores, and that Defendant's senior management has long been aware of these differences. *Id.*

Plaintiffs challenge these alleged practices under 42 U.S.C. § 1981 for intentional discrimination and under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*, for both disparate impact and disparate treatment. *Id.* at 2. Plaintiffs therefore move this Court, pursuant to Federal Rule of Civil Procedure 23, to certify the class as described below and appoint class counsel. Mots. (doc. 159 & 152). Before deciding the issues of certification and appointment of counsel, the Court must first address the motions filed by the parties in relation to these matters.

## III. Motions to Strike

### A. Defendant's Separate Motion to Strike and Motion to Withdraw Exhibit

#### i. Disclosure of Witnesses

Defendant moves to strike one declaration and two affidavits proffered by Plaintiffs in their motion to certify a class. Defendant's Mot. to Strike (doc. 191) at 1. First, Defendant moves to strike a declaration from Elizabeth

Lawrence[1] that presents testimony as to store conditions documented in internal inspection reports of Food City stores.[2] *Id.* at 1-2. Defendant argues that such evidence is inadmissible because Lawrence was never disclosed as a witness, lay or expert. *Id.* at 2.

The Federal Rules of Evidence allow summaries of contents of voluminous materials which cannot conveniently be examined in court. Fed.R.Evid. 1006. In the contested declaration, Lawrence identifies the documents to which she refers, the internal inspection reports, and summarizes some of their contents. In her statement, Lawrence does not offer any opinions about the documents. Instead, Lawrence discloses only information that she believes the documents convey. In addition, Lawrence attaches the summarized documents as Exhibit D to her declaration. Exbt. D (doc. 177).

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1. Elizabeth Lawrence is an attorney of record in this matter.

2. The contested statement reads:

> I have personally reviewed all of the internal inspection reports of Food City stores produced in this litigation by defendant, attached as Exhibit D. These reports reveal dirty conditions, including rodents, roaches, substandard equipment, flies, gnats and other insects, lack of soap in restroom, etc. In the course of this litigation, we received no reports of internal inspections at Bashas' stores or A.J.'s stores.

Decl. Lawrence (doc. 177).

Therefore, the Court concludes that Lawrence's statement is admissible as a summary for class certification purposes and considers it with the appropriate weight.

Second, Defendant moves to strike the affidavits of Joanne Huerta and Antoinetta Acuna, because Plaintiffs disclosed them as witnesses six days before they filed their motion for class certification. Defendant's Mot. to Strike (doc. 191) at 2. Defendant cites no legal authority indicating a violation on Plaintiffs' part, and does not provide the Court with any argument as to how Plaintiffs' late notice caused them ill effects.

Due to the lack of authority or arguments by either party on this matter, the Court finds that Defendant has not sufficiently shown a basis for their claim to strike the affidavits of Huerta and Acuna. As required under Federal Rule of Procedure 26(a) and 26(e)(1), Plaintiffs provided Defendant with notice of Huerta and Acuna as possible witnesses in a supplemental disclosure statement. Notice (doc. 150). Plaintiffs claim that they provided Defendant with Huerta and Acuna's names as soon as they knew of their willingness to testify in this matter and the declarations were signed. Resp. (doc. 194) at 3. Without further argument as to how Plaintiffs' supplemental notice was insufficient, the Court will consider the affidavits.

**ii. Attorney-Client Privilege**

Defendant contests Plaintiffs' use of an alleged privileged document, BAEMAIL 001668 ("the memo" or "the document"). Defendant's Mot. to Strike (doc. 191). Defendant asserts that the document in question was inadvertently disclosed to Plaintiffs during a production of documents conducted in 2004 and to the public when Defendant attached it as an exhibit to its Motion to Strike, which was filed unsealed. *Id.* at 2-3; Mot. to Withdraw (doc. 208) at 1. According to Defendant, the document sought legal advice on matters involved in the case at bar from Bashas' attorney, Tom Kennedy, and therefore is privileged. Defendant's Mot. to Strike (doc. 191) at 4. In contrast, Plaintiffs claim that the document is not a privileged communication and assert that even if deemed to be such, Defendant has waived the privilege by disclosing the document to others in their production and motion to strike.[3] Resp. (doc. 194) at 3-6. The Court will analyze the issue of waiver first.

Plaintiffs argue that Defendant cannot assert protection of the BAEMAIL 001668 document under the attorney-client privilege, because Defendant waived the privilege through disclosure. Resp. (doc. 194) at 6. "An express waiver [of an attorney-client privilege] occurs when a party discloses privileged information to

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3. On December 3, 2004, Defendant filed a motion to withdraw this exhibit, recognizing its mistake in attaching the contested memo to its motion and not filing the motion under seal. Mot. to Withdraw (doc. 208).

a third party who is not bound by the privilege, or otherwise shows disregard for the privilege by making the information public." *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir.2003). Inadvertence of disclosure does not as a matter of law prevent the occurrence of waiver. *Weil v. Investment/Indicators, Research and Management, Inc.*, 647 F.2d 18, 24 (9th Cir.1981). Here, Plaintiffs assert that any attorney-client privilege with respect to the BAEMAIL 001668 document was waived by its inclusion within the stack of documents produced by Defendant in 2004 and its inclusion in Defendant's motion to strike. Resp. (doc. 194) at 6. Although Plaintiffs have argued the merits of various federal cases dealing with the issue of waiver, Defendant has provided the Court with no counter argument on the issue.

The court notes that the regional circuits have developed at least three different methods of analyzing whether an inadvertent disclosure results in a waiver of the attorney-client privilege. As summarized in *Simon Property Grp., L.P. v. mySimon, Inc.*, 194 F.R.D. 644, 648 (S.D.Ind.2000) these three approaches include:

> The first might be termed the strict liability approach, so that any non-privileged disclosure, no matter how slight and no matter to whom, forfeits the privilege. The second is the subjective intent approach, so that only a deliberate disclosure forfeits the privilege. The third might be called the skeptical balancing approach, in which the court considers all the relevant circumstances.

*Id., cited in United States v. TRW, Inc.*, 204 F.R.D. 170, 176 (C.D.Cal.2001). This third approach, also called the "middle test," "pragmatic approach," and the "totality of the circumstances approach," has been embraced by the Ninth Circuit. *TRW, Inc.*, 204 F.R.D. at 176; *see also, Gomez v. Vernon*, 255 F.3d 1118, 1131-32 (9th Cir.2001); *United States v. de la Jara*, 973 F.2d 746, 749-50 (9th Cir.1992). As a result, it is the most persuasive test for the present analysis.

It must first be noted that the burden of establishing that the privilege applies to any document lies with the party asserting it-not the party contesting it. *See Weil*, 647 F.2d at 25. An element that the asserting party must prove is that it has not waived the privilege. *Id.; see also, In re Grand Jury Proceedings*, 517 F.2d 666, 670 (5th Cir.1975). The mere inadvertence of a privileged document's disclosure does not, as a matter of law, prevent the occurrence of waiver. *Id.* at 24; *see also, Underwater Storage, Inc. v. United States Rubber Co.*, 314 F.Supp. 546 (D.D.C.1970). As a result, this court must consider the factors adopted by the Ninth Circuit in determining whether an inadvertent disclosure has waived the privilege.

In determining whether the privilege has been waived, the Ninth Circuit considers the totality of the circumstances in order to determine whether the producing party took sufficient steps to safeguard the privilege. The specific factors considered include:

> (1) the reasonableness of the precautions to prevent inadvertent disclosure; (2) the time

taken to rectify the error; (3) the scope of the discovery; (4) the extent of the disclosure; and (5) the overriding issue of fairness.

*TRW, Inc.*, 204 F.R.D. at 177; *see also, Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal.1985) ( *citing Lois Sportwear U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y.1985). The court will analyze each of these factors below.

First, with regard to the reasonableness of the precautions taken to prevent the disclosure of the BAEMAIL 001668 document, the court must consider the circumstances in both situations where the memo was disclosed. Defendant has offered no argument as to what procedures or precautions it used to prevent inadvertent disclosure of the document.

Next, the court considers the time taken by Defendant to rectify the error. This factor focuses on the actions taken by the producing party to resolve the problem once it realizes that it has made an inadvertent disclosure. *TRW, Inc.*, 204 F.R.D. at 180. Here, in the first instance of disclosure, Defendant did not discover its mistake until it was conducting a deposition related to this action. Defendant's Mot. to Strike (doc. 191) at 2. In the second instance of disclosure, Defendant seems to have discovered its mistake a month after filing its motion to Strike. Mot. to Withdraw (doc. 208). It is arguable that Defendant only became aware of its mistake when Plaintiffs raised the issue in their response to Defendant's motion to strike. Resp. (doc. 194) at 6.

This factor seems to contemplate the situation where a producing party does realize the error, and then makes an effort to re-acquire the disclosed document. In *TRW, Inc.*, the court noted that the producing party immediately requested return of the documents and asked that they be sealed. 204 F.R.D. at 180. While the court considered these acts to be a "point in [the producing party's] favor," it still considered a several month delay in discovering the error to be a factor generally favoring the receiving party. *Id.* Certainly, in relation to the first instance of disclosure, Defendant's request that all copies of the document be destroyed was a reasonable remedial step. *See* Defendant's Mot. to Strike (doc. 191) at 3. Upon the second occurrence of disclosure, Defendant's filing of a motion to withdraw was also a reasonable remedial step. *See* Mot. to Withdraw (doc. 208).

The third and fourth issues will be discussed together as they are interrelated. These factors require the court to consider the scope of the discovery at issue, as well as the scope of the disclosure. Here, it appears undisputed that in the first instance of disclosure, Defendant produced approximately thousands of other emails and attachments, and that the memo is a one-page document. *See* Defendant's Mot. to Strike (doc. 191) at 2. In the second instance of disclosure, Defendant attached the one-page document to its own nineteen-page motion to strike. Exhibit 1 (doc. 191).

In *Lazar v. Mauney*, 192 F.R.D. 324, 330 (N.D.Ga.2000), a district court concluded that where

1,000 pages were produced with three privileged documents, the privilege was not waived. Likewise, in *Lois Sportwear U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y.1985), twenty-two privileged documents were produced with 16,000 documents. In the *TRW, Inc.* case, of the 200,000 documents produced, approximately 200-300 privileged documents were produced. 204 F.R.D. at 181. While the total number of documents produced was far greater in *TRW, Inc.*, that court considered the ratio of privileged documents produced in comparison to all documents was roughly similar to that in *Lois Sportwear. Id.* That ratio is roughly similar to the privileged documents produced in *Lazar;* which, in turn is similar to that in the present case, in regard to the first instance of disclosure.

While not creating a precise rule as to when the ratio is too close to constitute inadvertent disclosure, the above analysis is clearly intended to ensure that the disclosure was simply inadvertent-not reckless. One document stuck somewhere in the middle of thousands could reasonably be missed by even a careful review process. In contrast, one document attached as an exhibit to a nineteen-page document that, for the most part, argues how the exhibit is privileged and should be stricken from the record, would not likely be missed by a careful review process or inadvertently not filed under seal. Defendant argues that its attachment and unsealed filing of the memo should be deemed inadvertent because, at the time of submission, Defendant also filed several other "voluminous" pleadings. Mot. to Withdraw (doc. 208) at 1. However,

the fact that Defendant filed other voluminous documents, some under seal, at the same time it filed the contested memo within a nineteen-page motion does not indicate inadvertency. In fact, such circumstances tend to weaken such an assertion since Defendant was clearly aware that many of its exhibits required filing under seal, but, although the majority of its motion to strike focused on the alleged privileged communication, chose to file the motion and memo unsealed.

The rule established in the case law described above is intended to assure that the opposing party cannot take advantage of a reasonable mistake, while at the same time assuring that the privilege is safeguarded. After all, if there is no penalty to a reckless disclosure, there will be no incentive to diligently review discovery for privileged documents. This "middle test" simply recognizes that where the scope of discovery is vast in light of the narrowness of the disclosure-a reasonable mistake was probably made. Therefore, the Court finds that in Defendant's first incident of disclosure of the memo, its disclosure was inadvertent. However, Defendant's second unsealed filing of the contested document as an exhibit to its own motion is more an act of recklessness than inadvertency.[4] Due to Defendant's

4. Although the Ninth Circuit has not yet ruled on the issue, a District Court in the Third Circuit found that a party's filing of an alleged privileged document alone waives the attorney-client privilege. *See McGreevy v. CSS Industries, Inc.*, 1996 WL 412813, *2 (E.D.Pa.1996) (finding that the plaintiff's filing of the McGreevy Memorandum could alone constitute a waiver of the attorney-client privilege).

second act of disclosure, the Court finds that any privilege on the BAEMAIL 001668 document was waived and the document should not be stricken from the record. Based on this finding, the Court deems unnecessary any further analysis on whether the document was actually privileged, and shall deny Defendant's motion to strike (doc. 191). Consequently, Defendant's Motion to Withdraw Exhibit (doc. 208) is now moot and shall be denied.

## B. Plaintiffs' Motions to Strike Evidence and Deposition Testimony

### i. Motion to Strike Evidence Submitted by Defendant

On November 30, 2004, Plaintiffs filed a motion to strike evidence submitted by Defendant. Plaintiffs' Mot. to Strike (doc. 205). Essentially, Plaintiffs claim that many of Defendant's exhibits fail to comply with the Federal Rules of Evidence and are therefore inadmissible.

#### a. Relevancy

Plaintiffs assert that many of Defendant's submitted declarations[5] and exhibits are irrelevant to the motion for class certification and should therefore

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5. Plaintiffs move to strike Paragraphs 2, 4, 5, 6-8, 21, 26, 27, and 33 from the Affidavit of Michael Proulx. Plaintiffs' Mot. to Strike (doc. 205) at 8-12.

be struck from the record.[6] Under Federal Rule of Evidence 402, evidence which is not relevant is not admissible. Evidence is considered relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable [.]" Fed.R.Evid. 401.

In the case at bar, the Court finds that the majority of the exhibits contested by Plaintiffs for lack of relevance may make more or less probable the determination of whether Plaintiffs satisfy the requirements for class certification. An exception to this finding is Exhibit 46, which is a copy of a handwritten note in Spanish with no translation provided. Without an authenticated translation of this document, the Court cannot understand nor rely on its contents. Consequently, Exhibit 46 will not make more or less probable the determination of whether Plaintiffs satisfy the requirements for class certification. The Court finds that except for Exhibit 46, the remaining contested exhibits are relevant. Exhibit 46 shall be stricken from the record due to a lack of relevance.

**b. Lack of Foundation or Authentication**

Plaintiffs argue that many of Defendant's declarations[7] and exhibits lack foundation or have not

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6. Due to lack of relevance, Plaintiffs move to strike Defendant's Exhibits 1, 1A, 1C-1F, 1P, 4, 5, 18, 33, 43-47, 50-135. Plaintiffs' Mot. to Strike (doc. 205).

7. Plaintiffs seek to strike Paragraphs 2, 20, 26, 28, 29, 30, 35 from the Affidavit of Michael Proulx. Plaintiffs' Mot. to Strike (doc. 205).

been authenticated, as is required under Rule 901(a).[8] "Before evidence may be admitted, a foundation must be laid 'by evidence sufficient to support a finding that the matter in question is what its proponent claims.'" *Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1182 (9th Cir.1988). The testimony of a witness with personal knowledge of the facts who attests to the identity and execution of the document may lay the foundation required for receipt of a document into evidence. *See U.S. v. Dibble*, 429 F.2d 598, 602 (9th Cir.1970). "It is well established that unauthenticated documents cannot be considered on a motion for summary judgment." *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir.1989). Defendant, as the party offering the evidence, has the burden of presenting sufficient evidence of authenticity. Fed.R.Evid. 901(a).

Plaintiffs claim that Defendant has failed to lay a foundation or authenticate many of its declarations and exhibits, and has offered no evidence to sustain a finding that the documents are what they are purported to be. "No affidavit discloses the source of the documents . . . [and][n]o one offers sworn testimony as to the authorship of any of these documents." Plaintiffs' Mot. to Strike (doc. 205) at 2. Furthermore, Plaintiffs argue

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8. Plaintiffs, on the basis of a lack of foundation or authenticity, move to strike Defendant's exhibits 1, 1A-1I, 1N-1P, 1R-1U, and 1W; 2-5, 7, 8, 10-17, 20, 21, 24-37, 39, 40, 43, 45, 46, 47, and 49. Plaintiffs' Mot. to Strike (doc. 205) at 1.

that some of the listed exhibits were created only for litigation.[9] *Id.* at 3.

Defendant, in its response to Plaintiffs' motion to strike and request for authentication, provides the Court with the affidavits of Michael Proulx[10] and Stephanie Quincy.[11] Resp. (doc. 213) at Exbts. 1 & 2. Proulx, in his affidavit, states that many of the challenged exhibits are true and accurate and have been verified through employees whom he supervises. *See* Resp. (doc. 213) at Exbt. 1. Proulx also states that many of the documents are records kept in the ordinary course of business. *Id.* For purposes of the underlying motion, Proulx, as President and CFO of Bashas', Inc., has sufficient personal knowledge of the company's business, paid wages, store conditions, competitors, and other related information submitted in Exhibits 1A, B, C, D, E, F, G, H, I, N, O, P, R, S, T, U, 12, 13, 15, 34, 49. Proulx's affidavit swearing to the authenticity and correctness of these documents satisfies the foundation and authentication requirements of Rule 901(a) for purposes of a motion for class certification.

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9. Plaintiffs assert these claims in relation to Defendant's Exhibits 1B, 1D, 31, 33, 35, 36, and 37. Plaintiffs' Mot. to Strike (doc. 205) at 3.

10. Michael Proulx is the current President and Chief Operating Officer of Bashas', Inc., and has worked at Bashas' since 1966. Resp. (doc. 213) at Exbt. 1.

11. Stephanie Quincy is an attorney of record in this lawsuit.

*Appendix C*

Plaintiffs argue that due to a lack of authenticity, Defendant's Exhibit 7, the Report of Dr. Michael P. Ward, should be stricken from the record. The report is offered as Defendant's expert's testimony, but, as Plaintiffs note, is not a sworn statement. In response to Plaintiffs' motion to strike this exhibit, Defendant offers Quincy's affidavit which states that the exhibit is a true and correct copy of Ward's report. Exbt. 2 (doc. 213) at ¶ 4. The same report was included as an exhibit in Defendant's response to Plaintiffs' Motion to Use Expert Analysis as Rebuttal Opinion and was cited in Plaintiffs' reply on the issue. Reply (doc. 180) at 3. Because Plaintiffs' have cited the same document in a previous filing, the Court concludes that Plaintiffs do not substantially question the authenticity of Exhibit 7. The Court finds that it is reasonable to assume authentication upon Quincy's sworn statement that Exhibit 7 is what it is purported to be.

Quincy, in her affidavit, also claims that Exhibits 39, 40, 43, 45, and 47 are true and accurate copies of certain legal documents. Exbt. 2 (doc. 213) at ¶¶ 11-15. Quincy asserts that Exhibits 39 and 40 are true and accurate copies of EEOC filings made by potential class members and received from the EEOC pursuant to a Freedom of Information Act request. *Id.* at ¶¶ 11-12. In addition, Quincy affirms that Exhibit 43 contains bankruptcy filings related to the bankruptcy of named plaintiff Martinez, Exhibit 45 is a legal opinion by Administrative Law Judge Gregory Z. Meyerson, and Exhibit 47 includes criminal records related to potential class member Parra obtained from publicly available records.

Exbt. 2 (doc. 213) at ¶¶ 13-15. At this point in litigation, and without any further arguments as to why the documents are untrustworthy, it is reasonable to assume authentication upon Quincy's sworn statement that the contested exhibits are what they are purported to be.

Quincy also asserts that Exhibit 5 contains copies of pay rate records obtained from other grocery stores in response to appropriately served subpoenas. "As a part of this case, I served subpoenas upon Mercado Y Carniceria El Rancho, Inc., Carniceria El Camino, Inc., La Mexicana Supercarniceria # 1, Rita Ranch Market, 99 Ranch Market, 99 cent Store Corporation, and Uruapan Carniceria." Exbt. 2 (doc. 213) at ¶ 3. Defendant notes that "[t]he custodians of records of these exhibits have been disclosed as witnesses and will be called at trial to authenticate the documents if Plaintiffs do not stipulate to their authenticity." Resp. (doc. 213) at 10. Again, considering this lawsuit's point in litigation, and without any further arguments as to why the documents are untrustworthy, it is reasonable to assume authentication upon Quincy's sworn statement that the contested exhibits are what they are purported to be.

On similar grounds, Plaintiffs contest Defendant's submission of charts contained in Exhibits 21, 31, 33, 35, 36 and 37. The Court finds that the charts included in Exhibits 21, 31 and 37 are summaries of information that is either already admitted into evidence or obtained from voluminous business records. Exbt. 2 (doc. 213) at ¶¶ 5, 6, & 10; Exbt. 30 (doc. 190) at ¶ 9. The charts either

cite to the documents they are summarizing[12] or are authenticated by an accompanying affidavit and will be considered.[13] However, the charts included in Exhibits 33, 35, and 36 lack such foundation and authentication. These contested charts seem to be an organized version of defense counsel's personal notes and arguments related to this case. Although Quincy claims these documents to be summaries, the exhibits do not cite to the documents from which the information originally came. The Court cannot be expected to scrutinize the thousands of pages of documents submitted by the Defendant to locate the origin of such information. Therefore, the Court concludes that Exhibits 33, 35, and 36 lack foundation and consequently will not be considered in connection with the underlying motion. Due to the fact that Exhibit 1W is a copy of Exhibit 35, Exhibit 1W shall also not be considered.

In addition, asserting lack of authentication, Plaintiffs move to strike extracts of deposition testimony filed as exhibits by Defendant.[14] *Id.* at 4. Defendant, in its original filing of exhibits with its response to Plaintiffs' motion to certify class, submitted numerous

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12. Specifically, Exhibits 21 and 31.

13. Exhibit 31 is a copy of a chart that is attached to the affidavit of Tom Dominick, submitted as Defendant's Exhibit 30.

14. Specifically, Plaintiffs move to strike Defendant's exhibits 2, 3, 8, 10, 11, 14, 16, 17, 20, 24, 25, 26, 27, 28, 29, and 32. Plaintiffs' Mot. to Strike Evidence (doc. 205) at 4.

deposition excerpts without the court reporter's certification. *See* Resp. & Notice (doc. 190 & 193). "A deposition or an extract therefrom is authenticated . . . when it identifies the names of the deponent and the action and includes the reporter's certification that the deposition is a true record of the testimony of the deponent." *Orr v. Bank of America*, 285 F.3d 764, 774 (9thg Cir.2002).

Both parties concede that Defendant's Exhibit 10, excerpts of Michael Gantt's deposition transcript, should be stricken from the record due to the fact that they were filed without the court reporter's certificate. Plaintiffs' Mot. to Strike Evidence (doc. 205) at 4-5; Resp. (doc. 213) at 6-7. Exhibit 10 shall not be considered in connection with the motion for class certification.

As to the remaining contested exhibits, Defendant filed the missing certificates in its response to Plaintiffs' motion to strike the evidence.[15] Exhibit 4 (doc. 213). Although the certificates should have been originally filed with the exhibits, the Court sees no indication that Defendant's postponed filing will cause significant harm to Plaintiffs.

Finally, Plaintiffs object to thirty-five affidavits made by Spanish-speaking affiants who are employees of

15. The Court notes that Defendant did not attach a certificate for the deposition excerpts of Michael Gantt, Exhibit 10. Because the parties have agreed to the striking of the exhibit from the record, there is no issue concerning the appropriateness of a certification.

Defendant.[16] Plaintiffs' Mot. to Strike Evidence (doc. 205) at 7. Plaintiffs argue that Defendant failed to establish that the statements were properly translated and they should consequently be stricken.[17] *Id.* In their exhibits, Defendant submitted a number of affidavits from potential class members, written and signed in Spanish. Defendant also submitted what it asserted to be English translations of the affidavits that were also signed by the affiants. Plaintiffs contest the submission of these affidavits because "Defendant has offered no certified translation to confirm that the English versions are true and accurate translations of the document signed by the affiants." *Id.*

In response to Plaintiffs' motion to strike, Defendant submitted the affidavit of W. Todd Turner. Resp. (doc. 213) at Exbt. 5. In his sworn statement, Turner describes his qualifications and expertise regarding Spanish language translation and states that he translated the contested affidavits from English into Spanish. *Id.* However, Plaintiffs note that Turner does not explain the circumstances under which the affiants signed affidavits in two languages (e.g., whether the

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16. Plaintiffs move to strike Defendant's Exhibits 50, 53, 58, 69, 70, 71, 73, 77, 79, 82, 83, 87, 88, 91, 92, 93, 94, 95, 97, 100, 101, 102, 103, 108, 109, 113, 119, 120, 122, 124, 126, 127, 131, 132, and 134.

17. Plaintiffs move to strike exhibits 50, 53, 58, 69, 70, 71, 73, 77, 79, 82, 83, 87, 88, 91, 92, 93, 94, 95, 97, 100, 101, 102, 103, 108, 109, 113, 119, 120, 122, 124, 126, 127, 131, 132, 134. Plaintiffs' Mot. to Strike Evidence (doc. 205) at 7.

affiants were advised of the content of the English-language affidavits before signing them). Plaintiffs argue that Defendant has therefore failed to lay a proper foundation for the admission of the translated affidavits. *See Jack v. Trans World Airlines, Inc.*, 854 F.Supp. 654, 659 (N.D.Cal.1994).

Although Turner does not explain the circumstances under which the affiants signed the affidavits, he states that the translations are true and accurate. Exbt. 5 (doc. 213) at ¶ 5. Since the parties have not indicated that the affiants are illiterate, it is reasonable to assume that the Spanish versions of the affidavits were read and understood by the affiants. Consequently, it is irrelevant whether the English versions were signed by the affiants. The English versions need only be authenticated by the translator's, Turner's, sworn statement to such. These affidavits will be considered.

**c. Lack of Disclosure**

Plaintiffs assert that many of Defendant's exhibits should be stricken, because they were not disclosed during discovery.[18] Plaintiffs' Mot. to Strike Evidence (doc. 205) at 4. The Federal Rules of Civil Procedure direct that a party who "without substantial justification fails to disclose information required by Rule 26(a) or

18. Specifically, Plaintiffs move to strike exhibits 1B, 1W, 21, 31, 33, 35, 36, 37, and 50-135. Plaintiffs' Mot. to Strike Evidence (doc. 205) at 4. The Court will not review Exhibits 1W, 33, 35, and 36 under this claim as they have already been deemed stricken from the record based on other grounds.

26(e)(1), is not, unless such failure is harmless, permitted to use as evidence . . . on a motion any witness or information not so disclosed." Fed.R.Civ.P. 37(c)(1). Plaintiffs move to strike specific charts filed by Defendant that were allegedly not disclosed.[19] The charts contain information about store format histories, Plaintiffs' expert's report, health department inspections, and statements by affiants about store conditions. See Exhibits 1B, 21, 31 and 37 (doc. 190). Defendant admits that it did not disclose the charts to Plaintiffs, but claims that the information contained in the charts was disclosed. Resp. (doc. 213) at 6.

Although Defendant did not disclose to Plaintiffs the exact charts that they submitted into evidence, Plaintiffs do not contest that they received the information contained in the charts in other forms. Disclosure of the information in any form put Plaintiffs on notice of what evidence and documents Defendant intended to rely upon in this matter. Exhibits 1B, 21, 31 and 37 are merely summaries of such evidence. The Court finds that Defendant satisfied the disclosure requirements of Rule 26(a) or 26(e)(1).

Plaintiffs also contest Defendant's use of affidavits from eighty-five of Defendant's employees who were allegedly not disclosed as witnesses.[20] Defendant asserts,

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19. Plaintiffs move to strike exhibits 1B, 21, 31 and 37. Plaintiffs' Mot. to Strike Evidence (doc. 205) at 4.

20. Plaintiffs move to strike exhibits 50-135. Plaintiffs' Mot. to Strike Evidence (doc. 205) at 5.

and Plaintiffs do not contest, that sixty-eight of the contested affiants were disclosed in Defendant's First Supplemental Disclosure Statement. Resp. (doc. 213) at 6. The remaining affiants are defined by Defendant as rebuttal witnesses. *Id.*

As Defendant disclosed the names and addresses of sixty-eight of the contested affiants in their First Supplemental Disclosure Statement (doc. 70), the Court concludes that Rule 26(a) of the Federal Rules of Procedure pertaining to disclosures, has been satisfied. The affidavits of these witnesses shall remain in the record. Under Federal Rule of Civil Procedure 26, disclosure is not required for rebuttal witnesses. Therefore, the Court concludes that the remaining affidavits shall remain in the record and only used for purposes of rebuttal, as Defendant asserts.

**d. Lack of Personal Knowledge**

Plaintiffs object to Defendant's Exhibits 1 and 30, arguing that their authors lack personal knowledge of the matter they discuss.[21] Defendant's Exhibit 1 is the first affidavit of Michael Proulx. Plaintiffs contest the submission of many of Proulx's declarations included in the affidavit, arguing that Proulx lacks personal knowledge of the matters on which he opines. In his statements, Proulx discusses, among other things,

21. Although Plaintiffs also object to Defendant's Exhibits 1W, 33, 35, and 36, the Court will not review these exhibits under this claim because they have already been stricken on other grounds.

matters involving Bashas' past history and business, store formats, wage scales, store conditions, and competitors. Proulx, as President and CFO of Bashas', Inc., has sufficient personal knowledge of these matters for purposes of the underlying motion.

Defendant's Exhibit 30 is the affidavit of Tom Dominick. Dominick is the current Vice President of Food Safety and Sanitation for Bashas' and has handled food safety for the company since 1998. Exbt. 30 (doc. 190) at ¶ 3. In his affidavit, Dominick makes statements about his experiences with food safety and sanitation at Bashas' stores. Due to his position at Defendant's company, Dominick has sufficient personal knowledge of these matters to be considered on a motion for class certification.

**ii. Motion to Strike Deposition Testimony of Paul Joe Pedraza**

Plaintiffs also move to strike the testimony of Paul Joe Pedraza, Exhibit 38, submitted by Defendant in its response to Plaintiffs' motion for class certification. Mot. to Strike Test. (doc. 197). Essentially, Plaintiffs claim that the exhibit is the transcript of a deposition that was taken by Defendant without notice to Plaintiffs, as required under Federal Rule of Procedure 30(b)(1) and 32(a). *Id.* at 1. In contrast, Defendant asserts that the testimony is an affidavit that does not require notice and should not be struck. Resp. (doc. 212) at 6.

*Appendix C*

Although the Ninth Circuit has not reviewed this issue in relation to motions for class certification, the matter has been reviewed in regard to motions for summary judgment. The Ninth Circuit has held that a witness' statement taken in question and answer form, which had neither been subject to cross examination nor signed, was admissible under Rule 56(c). *In re Sunset Bay Associates,* 944 F.2d 1503, 1510 (9th Cir.1991) [hereinafter *Sunset Bay* ]. The court in *Sunset Bay* based their decision on the holding of a previous case, *Hoover v. Switlik Parachute Co.,* 663 F.2d 964 (9th Cir.1981), where it concluded that similar documents met the requirements for Rule 56(c) affidavits since they were made on personal knowledge and set forth facts in evidence. *Id.* at 965-66.

> [T]he logic of *Hoover* implies that an unsigned deposition should be admissible where, as here, the deponent was *sworn.* The approach of *Hoover* is pragmatic, looking to see if the deposition testimony is at least as reliable as an admissible affidavit. Because there is no reason to believe that the sworn answers to questions are less reliable that an affidavit, to the extent that the content of the deposition testimony is otherwise admissible, that testimony should be admissible on summary judgment.

*Sunset Bay,* 944 F.2d at 1510. In a later case, the court held that a statement was admissible under the same rule despite the fact that the party objecting to the

admission of the statement had not been present at the time it was taken. *Curnow v. Ridgecrest Police,* 952 F.2d 321, 324 (9th Cir.1991). The court in *Curnow* simply found the statement admissible "because [the witness'] answers to the questions were given under oath . . . [and the statement] was at least as reliable as an affidavit." *Id.*

An affidavit shall "be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed.R.Civ.P. 56(e). Similar to the above described cases, the contested exhibit in the case at bar contains statements taken in a question and answer form that were not subject to cross examination nor signed. *See* Exhibit 38 (doc. 190). Although Pedraza's statements were taken under oath, Plaintiffs argue that the sworn answers are less reliable than an affidavit because they are inadmissible under the Rules of Evidence. Reply (doc. 218) at 8-9. Plaintiffs object to the majority of Pedraza's statements by asserting that they are inadmissable hearsay or lay opinion testimony, lack personal knowledge or foundation, are prejudicial or irrelevant, or are responses to leading questions.[22] *Id.*

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22. In their Reply (doc. 218), Plaintiffs object to numerous statements contained in Pedraza's testimony, many of which were not included in the excerpted transcript filed by Defendant as Exhibit 38. Due to the fact that Plaintiffs' motion to strike specifically moves to strike Defendant's Exhibit 38, the Court only reviews the claims related to statements submitted in that exhibit, not the transcript in its entirety.

*Appendix C*

The statements included in Defendant's Exhibit 38 contain testimony concerning Pedraza's own employment history and work experience with the United Food and Commercial Workers Union ("UFCW"). *See* Exhibit 38 (doc. 190). Such information comes from Pedraza's personal experience and knowledge, and is admissible under Ninth Circuit case law. The Court does not find such statements to be inadmissible under any of Plaintiffs' theories. In addition, the exhibit contains remarks involving Pedraza's lay opinions about individuals and events related to this lawsuit. *Id.* Specifically, Pedraza makes statements involving Bashas' business decisions,[23] other individuals' fear of a certain person and their reasoning for signing certain documents,[24] and Bill McDonough's involvement in this lawsuit.[25] Opinion testimony of this type is admissible under Federal Rule of Evidence 701. Accordingly, the Court concludes that Defendant's Exhibit 38 is at least as reliable as an affidavit and need not be stricken from the record.

## IV. Plaintiffs' Motion to Use Expert Analysis as Rebuttal Opinion

On September 7, 2004, Plaintiffs filed a Motion for Permission to Use Previously-Disclosed Expert Analysis

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23. Defendant's Exhibit 38 (doc. 190) at 11, line 19-20.

24. Defendant's Exhibit 38 (doc. 190) at 22, line 7-8.

25. Defendant's Exhibit 38 (doc. 190) at 26, line 23-24; Defendant's Exhibit 38 (doc. 190) at 27, line 3-23.

as Rebuttal Opinion and Request for Expedited Decision. Mot. Reb. Opin. (doc. 147). The Court, finding no grounds for expedited treatment on the issue, denied Plaintiffs' request for an expedited decision. Order (doc. 149). The Court agreed to consider the matter in connection with Plaintiffs' motion to certify class, heard oral argument on the issue on January 24, 2005, and is now ready to rule. *Id.*

In their motion, Plaintiffs ask the Court to allow them to use analysis produced by their previously-disclosed expert as a rebuttal opinion. Mot. Reb. Opin. (doc. 147). Specifically, Plaintiffs seek the Court's permission to allow their disclosed statistical expert, Dr. Richard Drogin,[26] to present an opinion in rebuttal to an opinion expressed by defendant's expert, Dr. Michael Ward.[27] Mot. Reb. Opin. (doc. 147) at 2. The analysis at issue is Drogin's study of the rates of pay at hire for whites and Hispanics within Food City stores. *Id.* Defendant's expert, in his report, expressed the opinion that there cannot be discrimination in the pay between whites and Hispanics in Food City stores

26. Dr. Drogin is an Emeritus Professor in the Department of Statistics at California State University, Hayward and is a partner in a statistical consulting firm. *See* Decl. Drogin (doc. 160) at Exbt. 1, ¶¶ 1-2.

27. Dr. Ward has a Ph.D. in economics from the University of Chicago, is Senior Vice President of a consulting firm specializing in economic and statistica' research, and is a senior economist at a research firm that performs grant and contract research for the Federal Government. *See* Exbt. 7 (doc. 190) at ¶¶ 1-2.

because all employees are paid according to one pay scale. Exbt. 7 (doc. 190) at 8-9. To rebut Ward's assertion, Plaintiffs would like to submit a two-page report created by Drogin that includes an analysis of the actual pay received at initial hire for white and Hispanic employees within Food City stores. Exbt. 1 (doc. 148).

Defendant contests the submission of Drogin's initial hire pay analysis as a rebuttal opinion because the analysis is a new, previously undisclosed and unpled theory. Resp. (doc. 179) at 1. Defendant asserts that Drogin's analysis is a new theory of the case, requiring further depositions and analysis by their own expert on the same issue. *Id.* at 4-9. In connection with their opposition to Plaintiffs' motion, Defendant filed a cross motion requesting that if the report is admitted as a rebuttal opinion, Defendant be granted additional time to conduct another deposition of Drogin and have their own expert analyze the same matter and create a rebuttal report in response. Cross Mot. (doc. 179) at 10.

Plaintiffs wish to submit the contested opinion to counter Ward's claim on the impossibility of pay discrimination in Defendant's stores. Mot. Reb. Opin. (doc. 147) at 5. Consequently, the analysis more closely resembles a rebuttal than a new case theory. Therefore, the Court will allow Plaintiffs to submit Drogin's analysis as a rebuttal to Ward's report. The Court will only review the analysis as rebuttal in relation to Plaintiffs' motion for class certification. Because the report will be reviewed for such limited purposes and Defendant has not indicated how further questioning of Drogin and an

additional study will aid the Court in determining the issue of certification, Defendant's requests for an additional deposition of Drogin and time to submit a rebuttal report of its own are unnecessary.

. . .

## V. Class Certification

Plaintiffs ask this Court to certify a class consisting of:

> All Hispanic workers employed by defendant in an hourly position at any Food City retail store since April 4, 1998, who have been or may be subject to the challenged pay policies and practices and disparate working conditions.

Mot. (doc. 159) at 17. Federal Rule of Civil Procedure 23 governs class certification and has two parts. A party seeking certification must successfully meet all the requirements of Rule 23(a) and at least one of the requirements of Rule 23(b). *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186, *amended*, 273 F.3d 1266 (9th Cir.2001).[28] A party seeking class certification bears

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28. Fed.R.Civ.P. 23(a) requires:

> (1) that the class be so numerous that joinder of all members is impractical,
>
> (2) there are questions of law or fact common to the class,

(Cont'd)

the burden of proving facts sufficient to meet these criteria. *See id.* In determining a motion for class

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(Cont'd)

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class,

(4) the representative parties will fairly and adequately protect the interests of the class

Fed.R.Civ.P. 23(b) requires:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications . . . or

(B) adjudications with respect to individual members of the class would as a practical matter be dispositive of the interests of other members not parties . . . or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods of the fair and efficient adjudication of the controversy.

certification, a court must determine based upon a "rigorous analysis," whether each of the requirements of Rule 23 have been satisfied. *General Telephone Company of the Southwest v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). "Although some inquiry into the substance of a case may be necessary to ascertain satisfaction of the commonality and typicality requirements of Rule 23(a), it is improper to advance a decision on the merits to the class certification stage." *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 480 (9th Cir.1983); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). While a court's analysis must be rigorous, Rule 23 confers "broad discretion to determine whether a class should be certified, and [allows a court] to revisit that certification throughout the legal proceedings[.]" *Armstrong v. Davis*, 275 F.3d 849, 872 n. 28 (9th Cir.2001).

**A. Rule 23(a)**

**i. Numerosity**

First, Rule 23(a) requires that the proposed class be so numerous that "joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1). In the case at bar, Defendant does not contest certification based on failure to meet this condition. Moreover, as a class with thousands of members, this requirement is satisfied. Mot. (doc. 159) at 18; Decl. Drogin (doc. 160) at Exbt. 1.

**ii. Commonality**

Second, in order for a class to be certified, there must be "questions of law or fact common to the class . . ." Fed.R.Civ.P. 23(a)(2). The element of commonality specifically refers to the group characteristics of the class as a whole. *See Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 144-45 (N.D.Cal.2004). To find commonality, "[ a] ll questions of fact and law need not be common to satisfy the rule." *Hanlon v. Chrysler*, 150 F.3d 1011, 1019-20 (9th Cir.1998). "The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Id.* Generally, the element of commonality should be construed permissively, but a "mere allegation of individualized discrimination on the basis of race, coupled with proof that other people of color work in the same environment, is insufficient to establish commonality." *Donaldson v. Microsoft Corp.*, 205 F.R.D. 558, 565 (W.D.Wash.2001).

In this instance, Plaintiffs base their discrimination claims on Defendant's pay policies, the alleged disproportionality of Hispanics employed at Food City stores verses Defendant's other stores, and Defendant's alleged common practice of maintaining inferior store conditions at Food City locations. F. Amend. Complt. (doc. 116) at 4-7. Plaintiffs present extensive evidence to support their contention that there are factual and legal questions common to all class members with respect to whether Defendant has engaged in company-

wide discrimination against Hispanic employees in pay and working conditions. This evidence can be grouped into three categories: (1) facts and expert opinion supporting the existence of company-wide policies and practices; (2) expert statistical evidence of class-wide race disparities attributable to discrimination; and (3) anecdotal evidence from class members.

First, Plaintiffs present evidence that Defendant's policies governing compensation are similar across all stores due to the fact that all of Defendant's stores use company-established pay schedules to determine rates of pay. Mot. (doc. 159) at 4. Defendant concedes that such pay schedules are used, and that past pay schedules established for Food City stores contained lower pay ranges than those utilized at Bashas' and A.J.'s stores. Resp. (doc. 190) at 11; Exbt. 7 (doc. 190) at ¶ 10. However, both parties concede that over the past several years the contested pay scales have merged and, for the most part, are now identical. Mot. (doc. 159) at 7; Resp. (doc. 190) at 14-15. Consequently, some class members may now receive pay that is equal to that of their counterparts in Defendant's other stores, while other class members may not. Thus, although Defendant's system for compensating hourly employees is similar across all stores, the Court is not satisfied that the manner in which the system affects the class raises issues that are common to all class members.

Plaintiffs also present statistical evidence of class-wide race disparities. Decl. Drogin (doc. 160) at Exbt. 1. "Use of statistical analysis to raise an inference of class-

wide discrimination and satisfy commonality is well accepted." *Dukes*, 222 F.R.D. at 154. Plaintiffs rely primarily on the expert testimony of Dr. Drogin who concludes that there are statistically significant disparities between the workforce make-up of Defendant's Food City stores and its other stores, and between the compensation provided to Defendant's Hispanic employees verses employees of other races. Decl. Drogin (doc. 160) at Exbt. 1, ¶ 32.

Defendant argues that Drogin's analysis is incorrect and that there is no statistical pattern of discrimination at its stores. Resp. (doc. 190) at 19. Defendant relies on the testimony of its own expert economist, Dr. Ward, who provides a critique of Drogin's analysis. *Id.* at 19-27. Specifically, Defendant asserts that Drogin wholly disregarded Defendant's "actual" pay practices. *Id.* at 20 (arguing that Drogin failed to consider "that during the time in question, hourly workers at all formats were paid according to published pay scales . . . [and Drogin] failed to understand . . . the history of the [store] formats and wage scales.").

The Court may delve into the substance of expert testimony only to the extent necessary to determine if it is sufficiently probative of an inference of discrimination to create commonality. *See Dukes*, 222 F.R.D. at 154. A party challenging statistical evidence "cannot rebut an inference of discrimination by merely pointing to flaws in the plaintiff's statistics." *EEOC v. General Telephone Co. of the Northwest, Inc.*, 885 F.2d 575, 581 (9th Cir.1989). Rather, the party challenging

the statistical analysis must "produce credible evidence that curing the alleged flaws would also cure the statistical disparity[.]" *Id.* at 583.

Here, Defendant points out numerous flaws in Drogin's analysis but fails to put forth sufficient evidence that fixing the defects would cure the statistical disparity. Moreover, Dr. Ward and Defendant concede to three of Dr. Drogin's conclusions: (1) Food City Stores have a higher percentage of Hispanic employees compared to Bashas' or A.J.'s stores, (2) the pay scales at Bashas' and A.J.'s stores were higher than those at Food City during the period 1998-2000, and (3) Hispanic employee hourly rates were lower in similar jobs. Resp. (doc. 190) at 19; Exbt. 7 (doc. 190) at ¶ 10. However, these concessions alone do not indicate commonality among all the class members, as Defendant's pay scales, implemented at Food City and Bashas' stores, are now almost identical. Mot. (doc. 159) at 7; Resp. (doc. 190) at 14-15.

Finally, Plaintiffs submit anecdotal evidence in order to show commonality. Anecdotal evidence of discrimination is often used in Title VII pattern and practice cases to bolster the statistical proof by bringing "the cold numbers convincingly to life." *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). Here, Plaintiffs have submitted declarations from each of the class representatives, as well as declarations from class members. *See* Decl. G. Estrada (doc. 176); Decl. Martinez (doc. 163); Decl. Acuna (doc. 166); Decl. Lopez (doc. 173);

Decl. J. Estrada (doc. 164); Decl. Arriaga (doc. 175); Decl. Salazar (doc. 172); Decl. Gutierrez (doc. 171); Decl. Urbina (doc. 165); Decl. Parra (doc. 168). The declarants testify to their employment experiences and pay histories with Bashas' Inc., and the substandard conditions they witnessed in Food City stores. This anecdotal evidence, in combination with the other evidence previously discussed, supports an inference that Defendant's policies on working conditions have affected Plaintiffs in a common manner.

Although members of the proposed class may incorporate different factual circumstances in their claims, as current and former employees at Defendant's stores, they each have been subject to Defendant's stores' working conditions. Their claims all stem from the same source: the alleged existence of common discriminatory practices conducted by Defendant.[29] Therefore, on the issue of working conditions, the proposed class shares sufficient commonality to satisfy the minimal requirements of Rule 23(a)(2). The Court

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29. Defendant challenges the commonality of the proposed class by asserting that the class is simply too diverse. Resp. (doc. 190) at 36-45. Specifically, Defendant raises concerns with the diversity of the positions listed on the contested pay schedules, the employment experience of class members, and the locations of Food City stores. *Id.* Many of these arguments go to the merits of Plaintiffs' discrimination claims instead of the issue of class certification. Here, although the Court may consider the substance of a case when considering the commonality and typicality of a class, the Court need not make a complete determination as to the merits of Plaintiffs' claims in order to rule on these elements.

does not find sufficient commonality among the class members on the issue of pay. Thus, due to its inability to satisfy Rule 23(a)(2), the Court shall deny certification of the proposed class on the issue of discriminatory pay policies.[30]

**iii. Typicality**

Third, to be certified as a class, Rule 23 requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class . . ." Fed.R.Civ.P. 23(a)(3). As the Supreme Court has explained:

> The commonality and typicality requirements . . . tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.

*General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). Typicality refers specifically to the individual characteristics of the named plaintiffs in relation to the

30. Due to this determination, the Court has not reached the other requirements for class certification on this issue, and further expresses no opinion on whether Plaintiffs could satisfy such requirements.

class as a whole. *See Dukes,* 222 F.R.D. at 144-45. "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon,* 150 F.3d at 1020. It is sufficient for the plaintiffs' claims to "arise from the same remedial and legal theories" as the class claims. *See Dukes,* 222 F.R.D. at 166, *quoting Arnold v. United Artists Theatre Circuit, Inc.,* 158 F.R.D. 439, 449 (N.D.Cal.1994).

Here, the named Plaintiffs selected to represent the proposed class are Gonzalo Estrada and Aurelia Martinez.[31] Mot. (doc. 159) at 21. Both Estrada and Martinez are Hispanic and are current or former employees of a Food City store owned and operated by Defendant. Decl. Estrada (doc. 176) at 1; Decl. Martinez (doc. 163) at 1.

Estrada was employed at Food City from April 1999 until July 2002. Decl. Estrada (doc. 176) at 1. While employed with Defendant's company, he worked in the deli and meat departments, and was an hourly-paid employee. *Id.* at 2-3. Estrada claims that during his tenure at Food City, he was aware of the pay schedule differences between Food City stores and Defendant's other stores. *Id.* at 3. Estrada also claims that he witnessed unclean working conditions at the Food City store in Mesa, Arizona where he worked. *Id.* at 3-4. In

31. Plaintiffs notify the Court that Jos é Parra has withdrawn as a named plaintiff in this case. Reply (doc. 207) at n. 27.

the case at bar, Estrada has articulated claims for pay disparity and disparate working conditions. He exhausted his administrative remedies before filing this lawsuit under Title VII by filing an EEOC charge in November 2001. *Id.* at 5. Because Estrada suffered from the same alleged disparate working conditions as the potential class members, the Court finds that he sufficiently satisfies the typicality requirement of Rule 23 for this issue.

Martinez has been employed at a Food City store in Phoenix, Arizona since 1991. Decl. Martinez (doc. 163) at 1-2. Throughout her employment at Food City, she has worked only in the Tortilleria department. *Id.* at 2. Martinez states that she is an hourly-paid employee and claims that she has witnessed unclean working conditions at the store and in the department where she works. *Id.* 2-6. In the case at bar, Martinez has articulated claims for pay disparity and disparate working conditions. Despite the fact that she has not filed an EEOC charge, and therefore not exhausted her administrative remedies under Title VII, Martinez may "piggyback" onto Estrada's efforts and go forth with her Title VII claim. *See Albemarle Paper Co. v. Moody,* 422 U.S. 405, 414 n. 8, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975).

Defendant contests Martinez's typicality, arguing that the position in which she is employed is not comparable to a position located within the Bashas' or A.J.'s stores. Resp. (doc. 190) at 59-61. In contrast,

Plaintiff argues that in certain company documents,[32] Defendant lists Martinez's position as an equivalent to a donut fryer position. Reply (doc. 207) at 27. Without further information on this issue, the Court cannot determine whether Martinez's position has a comparable counterpart in Defendant's other stores. Regardless, Martinez claims she has suffered from the same alleged disparate working conditions as the proposed class members. While close, the Court finds that she sufficiently satisfies the typicality requirement of Rule 23(a)(3) on that issue.

**iv. Adequacy**

Fourth, the party moving for class certification must show that "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4).[33] Like the commonality and typicality requirements, it assures that shared interests between the representative plaintiffs and the class as a whole are present, but it also functions to ensure competency and the absence of conflicts. *See Amchem*

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32. Plaintiffs note the written pay scales and a document used to recruit new employees for Bashas' stores. Reply (doc. 207) at 27.

33. Since the revision of Rule 23 in December 2003, the adequacy of class counsel is now evaluated pursuant to Rule 23(g). "Rule 23(a)(4) will continue to call for scrutiny of the proposed class representative, while this subdivision will guide the court in assessing proposed class counsel as part of the class certification process." Fed.R.Civ.P. 23 Advisory Committee note.

*Products, Inc. v. Windsor*, 521 U.S. 591, 625-26, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997).

Defendant challenges Plaintiffs' adequacy, arguing that their alleged private, ulterior motives and actions show they are not adequate representatives of all class members. Resp. (doc. 190) at 47-52. Specifically, Defendant asserts that the named Plaintiffs are pursuing this case on behalf of the UFCW and are merely puppets of the organization. *Id.* at 47-48. Defendant argues that this ulterior motive indicates that the named plaintiffs have no individual claims and do not have the same interests as their class members. *Id.* at 48, 54.

The Court is not convinced that the named plaintiffs are inadequate due to Defendant's allegations of ulterior motives. Both proposed named plaintiffs, Estrada and Martinez have expressed their ability and willingness to represent the class. Decl. Estrada (doc. 176) at ¶ 13; Decl. Martinez (doc. 163) at ¶ 21. The interests of the class and those of the named plaintiffs are the same as both seek to prove that Defendant's working conditions discriminate against Hispanic employees. Both also seek the same result of an order of injunctive relief eradicating any discriminatory policies. Therefore, the Court finds that the named plaintiffs satisfy the element of adequacy required of Rule 23(a)(4). Concluding that Plaintiffs have satisfied the threshold elements of class certification enumerated in Rule 23(a) on the working conditions issue, the Court will now analyze the proposed class under the requirements of Rule 23(b).

*Appendix C*

**B. Rule 23(b)**

Certification under Rule 23(b) requires satisfaction of one of three elements. Here, Plaintiffs argue that they satisfy two of the possible elements listed in Rule 23(b).

**i. Rule 23(b)(2)**

First, Plaintiffs assert that they satisfy the requirements of Rule 23(b)(2), mandating that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole[.]" Fed.R.Civ.P. 23(b)(2); Mot. (doc. 159) at 23. "Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of Rule 23(b)(2) classes. *Amchem Prods.*, 521 U.S. at 614.

Here, Plaintiffs argue that certification under Rule 23(b)(2) is appropriate because Defendant has acted and refused to act on grounds generally applicable to the entire class. Mot. (doc. 159) at 23. Plaintiffs allege that Defendant has acted in a discriminatory manner generally applicable to the class, and plaintiffs have sought declaratory and injunctive relief with respect to the class as a whole. Amended Complt. (doc. 116) at 7-8.

> This declaratory and injunctive relief would include, *inter alia:* . . . 4) enjoining the maintenance of unequal terms and conditions

> of employment for class members, including the safety and cleanliness of the stores; and 5) a declaration that the challenged practices violate Section 1981 and Title VII.

Mot. (doc. 159) at 23.

On the issue of disparate working conditions, Defendant challenges Plaintiffs' ability to certify the class under Rule 23(b) (2), arguing that Plaintiffs' complaints do not support injunctive relief. Resp. (doc. 190) at 66. "They have not identified a specific policy or practice of discrimination to be enjoined [.]" *Id.* Defendant relies on the ruling in *Monreal v. Potter*, 367 F.3d 1224 (10th Cir.2004) to support its argument.

In *Monreal*, seven management-level Hispanic postal employees sought to represent a class of Hispanic management employees who had "suffered race discrimination with respect to the terms and conditions of their employment, or promotions, or retaliation[.]" 367 F.3d 1234. The plaintiffs offered statistics "to show that Hispanics constitute a proportionately lower number of managers than do whites." *Id.* at 1235. They also offered ninety-three declarations from members of the proposed class, complaining of discrimination in promotions, compensation, evaluations, job shifting and assignments, discipline, disrespectful treatment, training and advancement, a hostile and retaliatory environment that deterred Hispanic Postmasters and managers from seeking advancement and making or supporting Title VII charges, and serial retaliation on

*Appendix C*

Hispanic Postmasters and managers who made or supported Title VII charges. *Id.* at 1234-35. The Tenth Circuit affirmed the district court's denial of class certification under Rule 23(b)(2), because the plaintiffs had "not articulated a policy-besides generalized non-compliance with Title VII-that could be the subject of injunctive or declaratory relief," and the plaintiffs' complaint did not request "any specific relief of this type." *Id.* at 1236. Defendant argues that the same analysis should apply here. Resp. (doc. 190) at 67.

Despite the fact that this Court is not required to follow the Tenth Circuit's conclusions in *Monreal*, the claims here do not significantly resemble those of the Tenth Circuit case. In the case at bar, Plaintiffs claim that Defendant acted in a discriminatory manner by maintaining disparate working conditions in their stores. Unlike the numerous claims of discrimination articulated by the plaintiffs in *Monreal*, Plaintiffs here allege one main claim of a discriminatory practice or policy. Although the facts of each individual complaint may differ according to where and in what position the class member worked, viewed together they form a general claim that Defendant holds a discriminatory policy or practice in relation to working conditions offered in its Food City stores. Moreover, Plaintiffs seek specific declaratory and injunctive relief on this matter, defined as:

> 4) enjoining the maintenance of unequal terms and conditions of employment for class members, including the safety and cleanliness

> of the stores; and 5) a declaration that the challenged practices violate Section 1981 and Title VII.

Mot. (doc. 159) at 23. Thus, the Court concludes that Plaintiffs satisfy the requirements of Rule 23(b)(2) on the working conditions claim.

## C. Conclusion

The Court concludes that regarding their claim of disparate working conditions, Plaintiffs have satisfied the requirements of Rule 23(b)(2), and determines that a further analysis of Rule 23(b) (3) and Plaintiffs' hybrid claim are unnecessary. Consequently, the Court finds that on the issue of disparate working conditions, Plaintiffs have satisfied all of the requirements of Rule 23, and therefore grants in part and denies in part the certification of the requested class.

Plaintiffs have requested that the Court order that class members be provided notice and an opportunity to opt out, akin to that provided by Rule 23(b)(3). Mot. (doc. 159) at 26. Minimum due process requirements apply where the monetary relief sought in a class action lawsuit is "substantial." *Molski*, 318 F.3d at 948. The *Molski* court concluded that "notice and the right to opt-out [ ] must be provided to bind absent class members when substantial monetary damages are involved." *Id.* The court further indicated that a claim for punitive damages is "substantial." *Id.* at 951. Pursuant to Rule 23(d), the Court is permitted to order

notice and opt-out plans as it deems necessary. Fed.R.Civ.P. 23(d). However, in light of the fact that Plaintiffs seek no monetary damages in relation to their claims of disparate working conditions, there is no reason for any opt-out notification.

## VI. Appointment of Class Counsel

Rule 23(g) governs the standards and framework for the selection of class counsel for a certified class. Fed.R.Civ.P. 23(g).[34] The rule articulates four criteria that the court must consider in evaluating the adequacy of proposed counsel. The four mandatory considerations are (1) the work counsel has done in identifying or investigating potential claims in the action, (2) counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action, (3) counsel's knowledge of the applicable law, and (4) the resources counsel will commit to representing the class. Fed. R. Civ. Pro. 23(g)(1)(C)(i). The court is also free to consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class[.]" Fed. R. Civ. Pro. 23(g) (1)(C)(ii). "No single factor should necessarily be determinative in a given case." Fed.R.Civ.P. 23(g) Advisory Committee note.[35]

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34. Rule 23 was amended on December 1, 2003 and, as part of the revision, added subsection Rule 23(g).

35. Fed. R. Civ. Pro. 23(g)(2)(B) sets forth the standards to be followed by the court in selecting among competitive candidates to serve as class counsel. As this Court is not aware of any other attorneys interested in serving as class counsel in this case, this matter will not be reviewed.

*Appendix C*

In the case at bar, the law firm Davis, Cowell & Bowe and The Impact Fund[36] seek to be appointed counsel of the proposed class. Mot. for Appt. (doc. 152). Davis, Cowell & Bowe and The Impact Fund assert that they each satisfy the criteria articulated in Rule 23(g). Davis, Cowell & Bowe argue that they have already spent over three years identifying and investigating potential claims in this action, and associated The Impact Fund as co-counsel to further assist with their investigation. Decl. Lawrence (doc. 154) at ¶¶ 10-13. "Attorneys and staff of The Impact Fund have communicated with class members and assisted with the litigation of this action." Mot. for Appt. (doc. 152) at 4; Decl. Lawrence (doc. 154) at ¶ 11. Plaintiffs' counsel also assert that they have extensive experience with class action lawsuits and cases involving similar claims, and therefore have extensive knowledge of the applicable law. Mot. for Appt. (doc. 152) at 5. Plaintiffs note that Davis, Cowell & Bowe and The Impact Fund were recently appointed class counsel in *Dukes v. Wal-Mart Stores*, 222 F.R.D. 137 (N.D.Cal.2004). Mot. for Appt. (doc. 152) at 4.

Defendant challenges the appointment of Davis, Cowell & Bowe and The Impact Fund as class counsel. Resp. (doc. 189). Defendant questions Davis, Cowell & Bowe's dedication to the proposed class due to the fact that the firm also represents the UFCW. Resp. (doc. 189)

36. The Impact Fund is a non-profit legal foundation, which supports complex public interest litigation. Decl. Lawrence (doc. 154) at ¶ 3. Currently, The Impact Fund serves as lead counsel in the *Dukes v. Wal-Mart Stores* litigation. 222 F.R.D. 137 (N.D.Cal.2004); Mot. for Appt. (doc. 152) at 4.

at 3-7. Defendant argues that if the UFCW decides that this lawsuit is not in its best interests, the attorneys and named plaintiffs in this class action lawsuit will drop the case, to the detriment of the proposed class members. *Id.* at 3-4. Defendant also questions whether the attorneys have sufficient resources to litigate a class action suit.[37] *Id.* at 7. Moreover, Defendant argues that Plaintiffs' motion for appointment of class counsel is premature and should not be determined until after a determination concerning class certification has been made by this Court. *Id.* at 2.

Since it has been determined that the proposed class in this matter may be certified on the working conditions claim, the Court does not find that an appointment of class counsel is premature. See Rule 23(c)(1)(B) (providing that an order certifying a class action must appoint class counsel under Rule 23(g)). The law firm of Davis, Cowell & Bowe and The Impact Fund each have committed significant time and effort to investigating potential claims in this action. Davis, Cowell & Bowe has interviewed numerous Food City workers, reviewed corporate and public records, and, since the first complaint was filed, have taken and defended over thirty depositions, reviewed numerous documents, and litigated many motions. Decl. Lawrence (doc. 154) at ¶¶ 11 & 14. Since March 2004, The Impact Fund has communicated with class members and assisted Davis, Cowell & Bowe with this litigation. *Id.* at ¶ 11. Each have

37. Defendant, citing The Impact Fund's website, asserts that the organization consists of only two attorneys. Resp. (doc. 189) at 7.

also shown sufficient experience with employment claims and class action litigation, indicating that they both hold significant knowledge about the law applicable to the claims at hand.[38] Although The Impact Fund may house only a couple of attorneys, the Court is satisfied that that organization, working together with the law firm of Davis, Cowell & Bowe, will have sufficient resources and manpower to manage the class action lawsuit. Furthermore, despite Defendant's allegation that Plaintiffs' counsel will drop this case at the requests of the UFCW, the class action, once certified, cannot be dismissed or settled without the approval of the Court. Fed.R.Civ.P. 23(e). Therefore, the Court concludes that the law firm of Davis, Cowell & Bowe and The Impact Fund satisfy the criteria of Rule 23(g) and may be appointed class counsel to the class certified in this order.

Therefore,

IT IS ORDERED that Defendant's Motion to Strike Evidence From Plaintiffs' Motion to Certify Class (doc. 191) is DENIED.

IT IS FURTHER ORDERED that Defendant's Motion to Withdraw Exhibit (doc. 208) is DENIED as moot.

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38. Davis, Cowell & Bowe has handled numerous individual employment discrimination claims as well as a number of class actions. Decl. Lawrence (doc. 154) at ¶ 5. Impact Fund attorney Jocelyn Larkin has practiced employment discrimination law since 1987 and has served as class counsel in approximately 18-20 employment class actions. Decl. Larkin (doc. 153) at ¶ 4.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Strike Evidence (doc. 205) is GRANTED IN PART and DENIED IN PART in accordance with this order. Defendant's Exhibits 1W, 10, 33, 35, 36 and 46 are stricken.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Strike Deposition Testimony of Paul Joe Pedraza, Exhibit 38 (doc. 197) is DENIED.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Permission to Use Previously-Disclosed Expert Analysis as Rebuttal Opinion (doc. 147) is GRANTED.

IT IS FURTHER ORDERED that Defendant's Cross Motion to Depose Expert as to New Theory and Offer Expert Report in Opposition (doc. 179) is DENIED.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Class Certification (doc. 159) is GRANTED in part and DENIED in part. The Court certifies a class as follows:

All Hispanic workers employed by defendant in an hourly position at any Food City retail store since April 4, 1998, who have been or may be subject to the challenged disparate working conditions.

Plaintiffs' motion is denied, without prejudice, as to the issues of the challenged pay policies and practices.

*Appendix C*

IT IS FURTHER ORDERED that Plaintiffs' Motion for Appointment as Class Counsel (doc. 152) is GRANTED.

## APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED SEPTEMBER 12, 2008

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 06-16038

D.C. No. CV-02-00591-RCB
District of Arizona, Phoenix

JOSE PARRA; GONZALO ESTRADA, and AURELIA MARTINEZ; AURELIA MARTINEZ,

Plaintiffs - Appellants,

v.

BASHAS' INC.,

Defendant - Appellee.

### ORDER

Before: HUG, SCHROEDER, and CALLAHAN, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges Schroeder and Callahan have voted to deny the petition for rehearing en banc and Judge Hug so recommends.

*Appendix D*

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.